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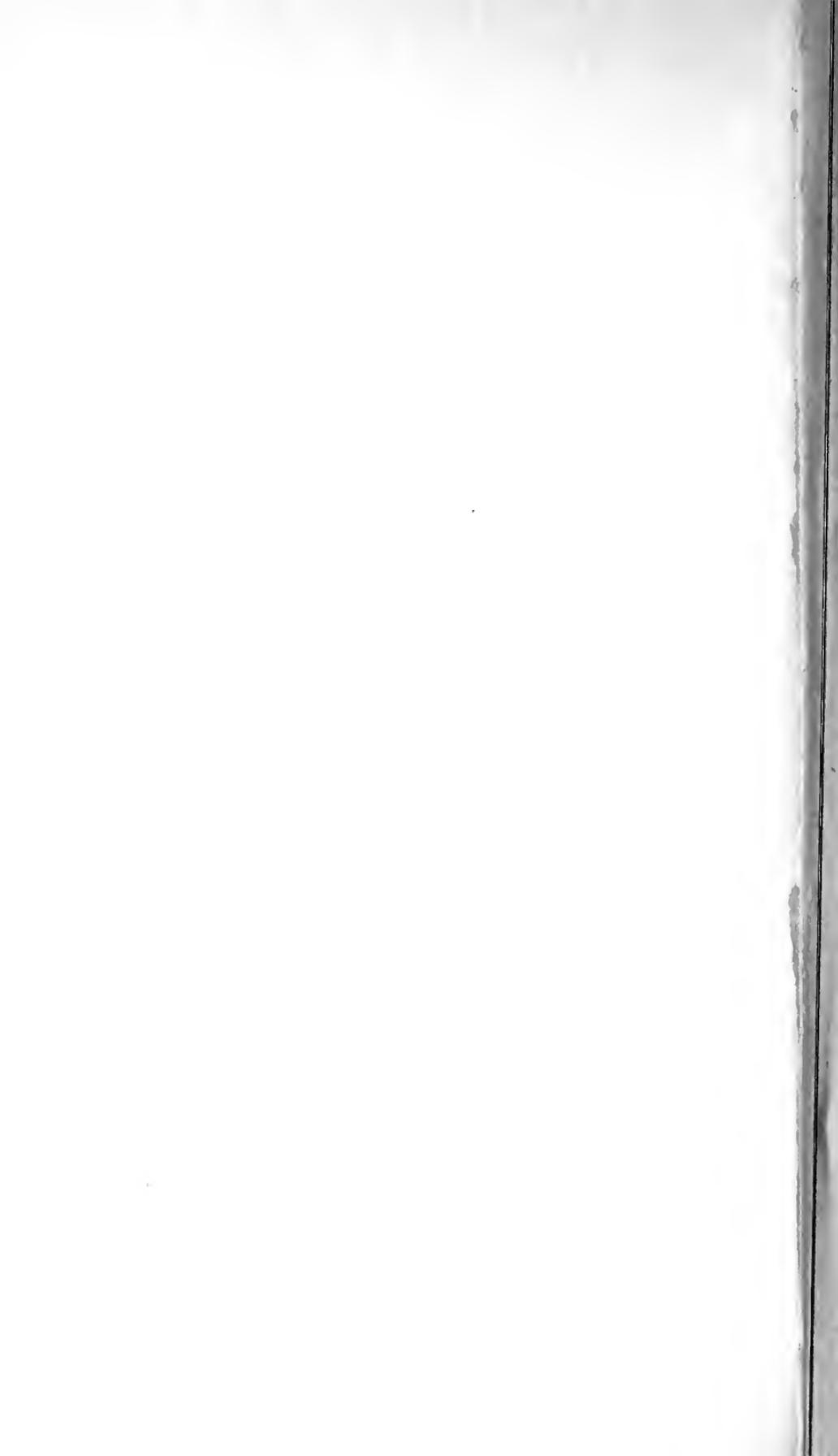
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**United States Court of Appeals
For the Ninth Circuit**

ROGER D. MEREDITH,

Appellant,

vs.

HARRY LEWIS and ALFRED SCHMID and HARRY
LEWIS and ALFRED SCHMID, a co-partnership,
doing business as the LEWIS CONSTRUCTION
COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
ALASKA, FOURTH DIVISION

BRIEF FOR APPELLEES

ROBBINS & ROBBINS

MORRIS A. ROBBINS

RALPH E. FRANKLIN

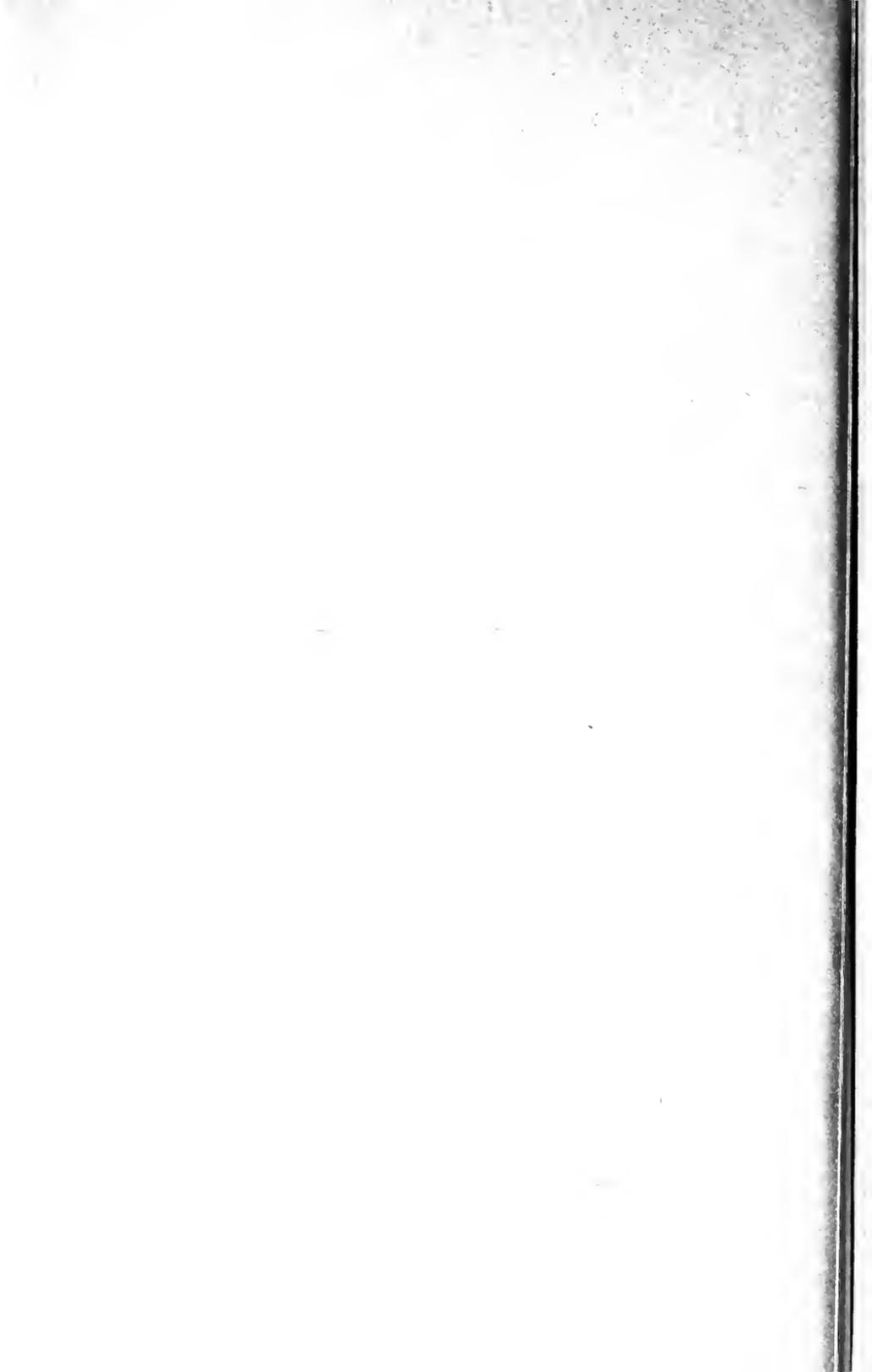
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United States Court of Appeals
For the Ninth Circuit

ROGER D. MEREDITH,

Appellant,

vs.

HARRY LEWIS and ALFRED SCHMID and
HARRY LEWIS and ALFRED SCHMID, a
co-partnership, doing business as the
LEWIS CONSTRUCTION COMPANY,

Appellees,

No. 13388

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
ALASKA, FOURTH DIVISION

BRIEF FOR APPELLEES

JURISDICTION

Appellant brought this action in the District Court of Alaska, 4th Division, for alleged damages for breach of contract. It was tried before a jury which returned a verdict in favor of appellees. Judgment was entered May 4, 1951. Notice of appeal was filed June 2, 1951. Cost bond was filed June 4, 1951.

STATEMENT OF THE CASE

Appellees, building contractors, had a contract to construct a building known as the Geophysical Institute at the University of Alaska, Fairbanks, Alaska. Appellees employed appellant by written contract "as superintendent and overseer" for said construction job "until said construction job is fully completed or until ter-

minated in the manner hereinafter provided." The employment contract provided in part as follows:

"7. It is expressly agreed that First Parties shall have the right to terminate Second Party's employment, for inefficiency, dishonesty, misconduct, or for any cause which First Parties shall deem sufficient, by giving Second Party written, telegraphic or other notice of such termination, and Second Party's employment shall be deemed and considered terminated immediately as of receipt of notice to that effect from First Parties. In the event of the termination of Second Party's employment, Second Party shall be entitled to receive his weekly salary herein provided for, computed to the date of termination, and no other or greater amount whatever, and Second Party shall not be entitled to demand or assert any other or greater claim whatever from First Parties."

By written notice and in accordance with its terms, appellees on January 3, 1950, terminated the contract. Appellant was paid his salary to the date of termination. Appellant claimed appellees wrongfully and in bad faith, terminated his contract. By this action appellant sought damages for the claimed wrongful termination.

Appellees also had a contract to construct a utilidor for said University. Appellant claimed he was employed by oral agreement to superintend such construction upon the same terms and conditions as his written contract of employment above referred to. Appellant claimed damages for alleged wrongful termination of this agreement also.

The issue involved was whether appellees acted wrongfully and in bad faith in terminating the employ-

ment contract. The jury resolved this issue against appellant. Appellant claims error in the instructions to the jury and in the admission of evidence.

Appellant's brief does not conform to Rule 20, Subdivision 2(d) of Rules of the United States Court of Appeals, for the Ninth Circuit, in that it does not contain, (1) A specification of errors relied upon; (2) the substance of evidence admitted over objection upon which error is claimed and the grounds of the objection thereto; and (3) the instructions or portions thereof claimed to be erroneous.

SUMMARY OF ARGUMENT

1. Appellant's claimed errors should not be considered because of the failure of appellant to comply with Rule 19, Subdivision 6, and Rule 20, Subdivision 2(d), Rules of the United States Court of Appeals for the Ninth Circuit.

2. The trial court correctly construed the contract and properly instructed the jury.

3. There was no error in the admission of evidence.

4. The verdict of the jury is amply supported by the evidence.

ARGUMENT

I.

Appellant's Claimed Errors Should Not Be Considered Because of the Failure of Appellant to Comply with Rule 19, Subdivision 6, and with Rule 20, Subdivision 2(d), Rules of the United States Court of Appeals for the Ninth Circuit.

Rule 19, Subdivision 6, Rules of the United States

Court of Appeals for the Ninth Circuit, provides in part as follows:

“In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely.”

Rule 20, Subdivision 2(d), Rules of the United States Court of Appeals for the Ninth Circuit, provides in part that briefs shall contain the following:

“In all cases save those of admiralty, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial.”

Appellant failed to file a statement of points on which he intends to rely, as required by Rule 19, Subdivision 6, above quoted. Appellant's claimed errors therefore should not be considered by this Court.

Williams v. Dodds, 163 F.(2d) 724.

Appellant made no attempt to comply with Rule 20, Subdivision 2(d) above set forth. His brief does not

contain any specification of errors as required by said rule. Therefore, appellant is not entitled to have his claimed errors considered by this Court.

Shanahan v. Southern Pacific Company, 188 F.(2d) 564;

Ziegler v. United States, 174 F.(2d) 439.

Appellant claims error upon the admission of evidence, but does not set out the grounds of objection urged at the trial or the full substance of the evidence admitted. With but a single exception, he makes no reference to the page number in the typewritten transcript. Appellant's complete disregard of the rules precludes him from having his claim of errors considered by this Court.

DuVerney v. U. S., 181 F.(2d) 853.

Appellant claims errors in instructions given by the trial court. However, appellant fails in his brief to set out "*totidem verbis*" the instructions complained of, nor does his brief set out the grounds of objections urged at the trial. Appellant is not entitled to have his claim of errors upon instructions considered by this Court.

Thiel v. Southern Pacific Company, 169 F. (2d) 30;

DuVerney v. U. S., 181 F.(2d) 853.

Appellant's utter disregard of the rules not only imposes undue and unnecessary difficulties upon this court, but renders it well nigh impossible for appellees to answer in an orderly manner and in the fashion contemplated by the rules. The best that appellees can do is

to ferret out and answer what appear to be appellant's contentions, hopeful that they have correctly discerned his argument. Obviously appellees cannot discuss specific assignments of error when none is set forth.

II.

The Trial Court Correctly Construed the Contract and Properly Instructed the Jury.

1. *The Contract*

The written contract of employment provided that appellees should have the right to terminate appellant's employment for inefficiency, dishonesty, misconduct, *or for any cause which appellees should deem sufficient.* The contract further provided that upon termination appellant was to be entitled to his weekly salary to the date of termination and nothing more. It is admitted that appellant was given written notice of termination on January 3, 1950, and that he was paid his weekly salary in full to that date.

2. *The Pleadings*

In his amended complaint, paragraph X, appellant alleged that appellees wrongfully and in bad faith, and without cause, and for the sole purpose of evading payment of money due him, terminated his contracts. These allegations were denied by appellees. By his said allegations, appellant affirmatively undertook to prove that the termination was wrongful and assumed the burden of proof with respect thereto. The jury resolved this issue against appellant and specifically found that the termination was not wrongful.

3. *The Evidence*

There is abundant evidence in the record to support

this finding of the jury. The evidence discloses many things which constitute sufficient grounds for termination. Chief among these was the fact that appellant was incurring excessive labor costs (Tr. 1085. See note below).

Under appellant's supervision of the Geophysical Institute job, that job was going steadily in the hole (Tr. 609), and on December 18, 1949, the labor costs to appellees exceeded their estimate by \$50,118.16 (Tr. 606). The job was not yet finished. After appellant was discharged in January, 1950, appellees incurred an additional payroll of \$29,800.00 (Tr. 640, 620). Complaint was made to appellant in July of 1949 that he was running the job in the hole and was exceeding the labor cost estimate (Tr. 703, 718). At the time appellant was terminated he was told that the main reason for his discharge was the excessive labor cost (Tr. 615).

Certainly, the incurring of such excessive labor costs was ample ground in itself for terminating appellant's contract. Particularly were appellees justified in complaining about labor costs in view of appellant's representation that his labor costs would be \$25,000.00 less than appellees' estimate (Tr. 610).

Many other things occurred which contributed to appellee's dissatisfaction with appellant's performance of

NOTE: The record in this case consists of four volumes. The first volume is the Clerk's transcript of the record. Volumes 2, 3 and 4 are the transcript of the testimony. In referring to the transcript of the testimony in this brief, appellees use the designation Tr. so as to indicate pages in the transcript contained in volumes 2, 3 and 4 of the record.

his contract. If not singly, then certainly cumulatively, they constituted sufficient ground for terminating the contract. Without attempting to detail all, brief reference is made to some of them:

Overhead expense. Appellant incurred excessive overhead expense during the progress of the work (Tr. 662).

Waste of topsoil. Under the terms of its construction contract, appellees were required to preserve the topsoil if any was available. Appellant was so instructed. Contrary to his instruction he failed to do so. This resulted in substantial unnecessary expense (Tr. 581-587).

Excavation. Under appellant's supervision the excavation work was originally made in the wrong place and had to be corrected (Tr. 331).

Failure to work concrete properly. The Geophysics Building was a concrete structure. It was necessary to set up an efficient system for mixing the concrete, conveying the same to the upper stories and accomplishing the pour in the constructed forms. Appellant was instructed as to the system the appellees desired to use. Appellant was wholly unable to make efficient use thereof, thereby incurring much additional cost and delay (Tr. 592, 665, 980).

Improper walls. In the construction of the cement walls, forms were first built into which the concrete was to be poured. The form had to be constructed in such manner as to contain the concrete without bulging and the pouring had to be made so as not to cause or permit bulging. The forms were improperly constructed and the cement improperly poured, with the result that the walls bulged and were "wavy." It was necessary for

workmen to trim the wall by chipping off a great deal of the cement where the bulges occurred. Much expense was incurred in doing this work. At the time of the trial, the building had not yet been accepted by the governmental agency for which it was built, and doubt existed as to whether the walls would be approved (Tr. 668, 672, 697, 885, 983-4, 1044).

Reglets. Under the specifications of the construction contract, reglets were required to be installed. Under appellant's supervision they were improperly installed and had to be corrected (Tr. 674, 1077).

Coloring floors. Under the specifications of the construction contract, the cement floors were required to be colored. The coloring was to be mixed with the cement. Appellant neglected to have his done and it had to be corrected by subsequently coloring the floors (Tr. 674).

Balustrade. The plans required a balustrade to be constructed along the stairway. Under appellant's supervision it was improperly built and had to be rebuilt (Tr. 673).

Delay in forwarding bills. Under the appellee's method of doing business, when deliveries were made at the job and a bill was received, it would be checked by the appellant. Appellant was then required to forward the bills to the Seattle office of appellees from whence all payments were made. Appellant neglected to forward bills in a timely manner with the result that the appellees' credit was impaired (Tr. 985-6-8).

All of the foregoing bore directly upon appellant's method of performing his contract. A number of matters came to the appellees' attention bearing upon ap-

pellant's personal conduct. Appellees were aware of these things and considered them in arriving at their decision to terminate appellant's employment. They consisted of the following:

Fishwheel incident. During the time that appellant was superintending the project, a gold strike developed known as the "Fishwheel Gold Strike." Appellant and one Remling, a sub-contractor on the Geophysical job, jointly interested themselves in a gold claim. In connection therewith appellant absented himself from his job and spent time at Fishwheel (Tr. 959, 1089, 1396, 1403).

N.S.F. checks. Appellees received reports that during the progress of the job appellant issued checks in connection with his personal affairs which were returned by the bank because of insufficient funds (Tr. 905).

Soliciting co-signature of notes. Appellees received reports that appellant had solicited, and induced, sub-contractors to co-sign appellant's personal notes given for his own benefit (Tr. 905).

Improper charges to the job. Appellant obtained a drill for use in connection with the Fishwheel venture. He had the drill stored and caused the storage to be charged to appellees (Tr. 1096).

Gambling. Appellees received reports that appellant attended gambling establishments and engaged in gambling while under contract with appellees (Tr. 1085-86, 704).

The evidence discloses that appellees were not alone

in their dissatisfaction with appellant. The Government inspector upon the Geophysical job was dissatisfied to the point where he wanted him removed and even considered seeking action through Washington, D. C., to accomplish his removal (Tr. 727, 993).

The enumeration of the foregoing by no means exhausts the list of things considered by appellees in arriving at their decision to terminate the contract. An examination of the voluminous transcript of the testimony in this case reveals considerably more than has been outlined above. The matters were factual and being in dispute, it was within the province of the jury to determine them. Their determination by the jury, made pursuant to proper instructions, is conclusive.

4. *The Law*

The contract reserved to appellees the right of termination for any cause which they deemed sufficient. It is the settled law that such a provision permits the employer to terminate the contract at any time so long as he acts in good faith. The employer is the sole judge and the court cannot substitute its judgment for that of the employer. The only issue is the good faith of the employer. The following citation from page 4 of appellant's brief confirms this rule:

“GOOD FAITH. A reservation of the right to discharge for reasons of the sufficiency of which the employer reserves the right to be the sole judge does not give the employer the right to terminate the contract without a reason or for a false reason, but if exercised in good faith his judgment is not reviewable. 39 C.J., Section 61, p. 73. *American Music Stores v. Russel*, 232 Fed. 306.”

A clear statement of this rule is found in 35 Am. Jur. 463, Sec. 28, under the title "Master and Servant":

"It is generally conceded that a contract by which one agrees to employ another as long as the services are 'satisfactory,' or which is otherwise expressed to be conditional on the satisfactory character of the services rendered, gives the employer the right to terminate the contract and discharge the employee whenever he, the employer, acting in good faith, is actually dissatisfied with the employee's work. Even though the parties to the employment contract have stipulated that the contract shall be operative during a definite term, if it provides that the services are to be performed to the satisfaction of the employer, the employment may be terminated by him at any time if he in good faith becomes dissatisfied with the services of the employee. In neither case is it necessary that there exist real or substantial grounds for the employer's dissatisfaction. Under such an employment contract, the employer is the sole judge as to whether the services are satisfactory; the court cannot substitute its judgment as to the reasonableness of the grounds of dissatisfaction. However, while it is not essential to the existence of the right to discharge the employee that the employer have any real or substantial ground for dissatisfaction, yet he must act honestly and in good faith. His dissatisfaction, to justify the discharge, must be real and not pretended; it must not be capricious or mercenary or the result of a dishonest design to be dissatisfied in any event. If he feigns dissatisfaction and dismisses the employee, the discharge is wrongful. While a jury may not pass upon the reasonableness of the employer's dissatisfaction, it is proper to submit to them, where the evidence is conflicting,

the questions whether the expressed dissatisfaction is genuine or merely feigned, and whether it was the cause of the employee's dismissal."

This text lists many citations. For additional cases announcing this rule see:

American Music Stores v. Kussell (CCA. 6th)
232 Fed. 306;

Ferris v. Polansky (Md.) 59 Atl.(2d) 749;

Cressey v. International Harvester Company
(CCA 9th) 206 Fed. 29;

Cooper v. Singer (N.J.) 191 Atl. 849;

Olson v. Arabian American Oil Co. (D.C.N.Y.)
97 F.Supp. 801.

5. *The Instructions*

The court instructed the jury in accordance with the rule above stated. Appellant complains of the court's instructions. However, in most instances he does not identify the instruction complained of nor does he set any forth. It is therefore exceedingly difficult for appellees to reply to the arguments. The only logical procedure appears to be to answer the arguments *seriatum* in the order they appear in appellant's brief.

Appellant's first complaint seems to be directed to the instruction wherein the court construed the contract and submitted to the jury the issue of whether appellees acted in good faith in terminating the contract. It is the universal rule announced by the text writers and cases that the term "any cause deemed sufficient" embodied in an employment contract gives the employer an absolute right to terminate the employment as long as

he acts in good faith, and that the only issue to be submitted to the jury is the good faith of the employer. The instruction complained of is clearly in conformance with this universal rule.

Appellant argues that the trial court shifted the burden of proof and instructed the jury that appellant must prove that the allegations of the answer were false. There is no such instruction in the record. The court set forth in its instructions the allegations of the complaint and stated that the burden was upon appellant to prove his allegations by a preponderance of the evidence. This is clearly a correct statement of the law. It is so fundamental that a plaintiff must prove the allegations of his complaint that further comment would seem to be unnecessary.

Appellant claims that the trial court did not instruct the jury properly upon the matter of preponderance of evidence. The record amply demonstrates that this contention is without merit. Instruction No. 14 of the trial court is as follows:

“Whenever in these Instructions I have stated that the burden of proof was upon a party to prove any issue, it shall be deemed to mean that such issue must be proved by a preponderance of the evidence, and that if the evidence as to such issue is equally divided, or preponderates to the contrary, the Jury should find that issue against the person having the burden of proof.”

Instruction No. 16 reads as follows:

“You are instructed as follows:

“1. That by ‘preponderance of evidence’ is meant the amount of evidence which taken on the

whole, produces the stronger impression upon the minds of the jury and convinces them of its truth when weighed against the evidence in opposition thereto; * * *

“3. That it is manifestly impossible for the Court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly; * * *.”

It is apparent that the trial court clearly, succinctly and properly instructed the jury with respect to the term “preponderance of the evidence.”

Appellant argues that the trial court improperly instructed the jury relative to the consideration of hearsay evidence. This argument is apparently directed against instruction No. 2. Appellant’s exceptions upon this matter appear in the transcript of the record at pages 1451 and 1452. After calling the court’s attention to the particular instruction, counsel for appellant stated as follows:

“MR. PARRISH: We feel you should state it should be considered only for the purpose it was admitted for. It was admitted for a special purpose and should be considered only for the special purpose.”

And the court then stated,

“THE COURT: I will cross out ‘or otherwise,’ and have written after hearsay, ‘which was admitted in evidence to the extent for which it was admitted.’ All right.” (Tr. 1452)

Thereafter the court instructed the jury as follows:

“THE COURT: Ladies and gentlemen of the jury, on page 2 of my instructions in the next to the last sentence of the fourth paragraph on that page,

after the word 'hearsay,' I have crossed out the words 'or otherwise' and have interlineated the following words, 'which was admitted in evidence to the extent for which it was admitted.' " (Tr. 1463)

No exception was thereafter taken to the corrected instruction of the trial court. It thus appears from the record that the trial court complied with appellant's request and reframed its instruction to meet the objection of appellant.

The court had admitted some evidence, referred to as hearsay evidence, which was limited to the sole purpose of its bearing on the good faith of appellees. The trial court was painstaking in cautioning the jury that such evidence was to be considered only for this limited purpose. By its instructions the court made it crystal clear that the jury could consider this testimony only insofar as it bore upon the question of good faith.

Appellant attacks the court's instruction to the effect that Roy Johnson was not authorized to make an employment contract with appellant as to the utilidor job.

Appellant alleged that he was employed by oral agreement to superintend the construction of the utilidor. Appellant's testimony relative to this oral agreement was as follows:

"Q. Now, what arrangements did you make with Mr. Johnson in regard to that work?

A. Only that I asked Mr. Johnson if Lewis had said anything about my percentage continuing through and he said, 'Your percentage will continue through.' He didn't say Lewis said so. He inferred my percentage would go through on that job.

Q. What percentage do you mean?

A. Well, my salary wasn't to be changed, but I was to receive 20% of any profit that I—any cost savings I effected under Mr. Johnson's estimate and at the time Mr. Johnson says, 'If you can do it like you think you can, you've got a nice piece of money.'

Q. Did you ever discuss that arrangement that you had with Mr. Johnson with Mr. Harry Lewis?

A. Not with Mr. Lewis, but with Alfred Schmid." (Tr. 31-32)

Later, when testifying about the oral agreement, appellant testified as follows:

"A. I mean just exactly and specifically this, Mr. Cottis: That Mr. Schmid knew, and Mr. Johnson knew that I was doing that work fully expecting to be paid for it on any savings effected under the contract, and I told Roy Johnson when he made the bid and I helped him to make the bid which was later awarded to the Lewis Construction Co. that by no—that let there be no mistake about it, I was not going to do that work without compensation for it. Now, on no subsequent visit by Schmid or Johnson did they ever tell me that I was not to receive that 20 per cent. Now, is that clear in your mind, Mr. Cottis?" (Tr. 1376-1377)

The Lewis Construction Company was a co-partnership consisting of Harry Lewis and Alfred Schmid. The witness, Roy Johnson, testified:

"A. Well, no particular arrangement other than what I stated yesterday that Dick wanted to know if he was going to get his 20 per cent cut on it, and I told him as far as I was concerned it was all right, but I did not have the authority to make such a deal

with him, and he would have to take it up with Harry Lewis or Al Schmid." (Tr. 712)

Alfred Schmid testified that he never made any oral agreement with appellant for the utilidor job. Admittedly the appellant did not discuss the matter with Harry Lewis. The verdict of the jury included a special interrogatory with answer, as follows:

"Q. No. 6. Has it been proved by a preponderance of the evidence in this case that in the month of May or June, 1949, the plaintiff and Lewis Construction Company through Alfred Schmid, partner, entered into an oral agreement wherein plaintiff agreed to act as superintendent of construction on the utilidor job and Lewis Construction Company agreed to pay him therefor 20% of any savings made between the estimated cost of said job and the actual cost thereof?

A. No."

The testimony is clear that Roy Johnson did not have any authority to make such an agreement with appellant and there is nothing in the evidence from which any such authority could be inferred. Appellee Alfred Schmid testified that the only authority Johnson had with respect to the utilidor job was the authority given him to submit a bid. Johnson had no authority to enter into any agreement of employment with appellant (Tr. 871-873). The witness, Johnson, testified that the only authority he had with respect to the utilidor job was authority to submit a bid. He denied that he represented himself as having any other authority in the matter whatsoever (Tr. 711). The record is devoid of any evidence from which it could be implied that Johnson had

any authority to make an employment agreement with appellant. It is noteworthy that appellant testified with respect to his relations with Johnson as follows:

“A. No, but I didn’t consider them my bosses. I had to get along with them and try to get the job up for them, but no one ever told me that Roy Johnson was ever my boss.” (Tr. 437)

On page 5 of his brief appellant cites *Standard Accident Insurance Co. v. Simpson*, 64 F.(2d) 583. The citation quoted deals with secret limitations on the authority of an agent. It has no relation whatever to the question of implied authority of an agent. Appellant refers to no testimony, and indeed none can be found in the record, of any secret limitation of authority of Mr. Johnson. The case cited is clearly inapplicable to the situation here.

The foregoing covers all of the arguments made by appellant respecting the court’s instructions as far as appellees have been able to discern. As previously mentioned, it is most difficult for appellees to answer appellant’s arguments because of appellant’s failure to assign specific errors and to set out the instructions complained of. Appellant’s criticism of the court’s instructions is without foundation or merit.

III.

There Was No Error in Admission of Evidence

Appellant argues that the trial court erred in its rulings on the admission of evidence. His brief does not set out the evidence referred to nor the objections made thereto. Seemingly appellant refers to the evidence which the court admitted for the limited purpose of

showing the state of mind of appellees so as to determine their good faith or lack of good faith in terminating appellant's employment agreement. The admitted evidence had to do with reports received by appellees and related to appellant's work and personal conduct. The jury was at all times advised by the court that it could consider such evidence only for the limited purpose for which it was admitted. At various stages of the trial the court admonished the jury to this effect and called to its attention the limitation upon such evidence. Typical of the court's admonitions is the following:

“THE COURT: Well, this will be limited for the purpose of showing the state of mind of the defendants whether they were in good faith or in bad faith in finally terminating the contract. I don't think anything except that last line is of any importance.” (Tr. 1001)

Similar admonitions of the trial court appear at pages 648, 684 and 996 of the transcript.

At the trial appellant's counsel conceded the admissibility of the evidence for the limited purpose stated by the court. This is indicated by the following statement of one of appellant's counsel:

“MR. PARRISH: I have no objection, your Honor, to him stating what he told Harry Lewis and I think he is entitled to state that, but he is not entitled to state what the facts were.” (Tr. 901).

The testimony complained of was clearly admissible for the purpose of showing good faith on the part of appellees in terminating the contract.

In *Central Heights Improvement Company v. Memo-*

rial Parks, Inc., 105 P.(2d) 596, the Supreme Court of California stated as follows:

“ * * * Nor was the evidence inadmissible as hearsay because appellant was not a party to the proceedings before the corporation department. The testimony and documents were received not as evidence of the truth of the matters therein contained or stated, but as evidence of acts of respondents which were required of them under the contract, and which formed a part of the entire transaction in dispute—as distinguished from that portion alleged in the complaint. When the good faith of a party is in question, the information upon which he acted, whether true or false, is original and material evidence, and admissible.”

In *McAfee v. Travis Gas Corporation* (Tex.) 153 S.W.(2d) 442, the opinion states:

“ * * * We quote the rule as announced in *Jones on Evidence, supra*:

“ ‘Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay.’ ”

The foregoing authorities state the universal rule upon this subject. Appellant cited no authority whatever to the contrary.

Appellant contends that the trial court erred in admitting evidence relative to the claim of one Remling. The circumstances surrounding the Remling claim are these: Appellant claimed damages based upon the savings he would have made below the estimated cost if he had been permitted to finish the contract. Appellee Schmid was testifying as to the actual cost of construc-

tion. Remling, a sub-contractor, asserted a claim against appellees in the amount of \$2,000.00 for material allegedly supplied. Demand for this amount had been made upon appellees by Remling's attorney. Schmid testified to the Remling claim as one of the items to be considered in computing the cost of construction. It was clearly material for that purpose. Furthermore, the matter is of no consequence because the jury found that the termination of the contract was warranted and that appellant was entitled to receive nothing. The question of the amount of damages therefore is immaterial.

IV.

Verdict of the Jury Is Amply Supported by the Evidence

The principal issue in this case was whether or not appellee acted in good faith in terminating appellant's employment. Appellant elected to have this issue tried before a jury. The issue was submitted to the jury under proper instructions. The jury resolved the issue against appellant.

Specific interrogatories were submitted to the jury. Amongst these and the answers thereto were the following:

“Q. No. 1. Has a preponderance of the evidence in this case proved that the termination of plaintiff's employment by means of said termination notice (Exh. B. attached to plaintiff's amended complaint) was in good faith or in bad faith?

A. Good faith.

Q. No. 2. What would have been the total cost of the Geophysical Institute job if plaintiff's employment had not been terminated by defendants?

A. \$602,038.36.

Q. No. 6. Has it been proved by a preponderance of the evidence in this case that in the month of May or June, 1949, the plaintiff and Lewis Construction Company through Alfred Schmid, partner, entered into an oral agreement wherein plaintiff agreed to act as superintendent of construction on the utilidor job and Lewis Construction Company agreed to pay him therefor 20% of any savings made between the estimated cost of said job and the actual cost thereof?

A. No.

Q. No. 7. Was it wrongful and against the precepts of these instructions for defendants to terminate the oral agreement if there was such an agreement of employment between plaintiff and the Lewis Construction Company as to the utilidor job?

A. No.”

It is thus evident that the jury found against appellant on all material points. It found that appellees acted in good faith in terminating appellant's employment. It found that appellant failed to establish an oral contract for the utilidor job. It found that even if there had been such an oral contract appellees were warranted in terminating it. It found that not only did appellant fail to effect a saving on the Geophysics job, but that his cost exceeded appellees estimate.

There was ample evidence to support each and all of the jury's findings. Brief reference has heretofore been made to some of the evidence. A reading of the record amply demonstrates that under the evidence the jury's verdict was not only proper, but in fact was the only one which it could have, in justice, rendered.

CONCLUSION

Appellees respectfully submit:

1. That appellant's claims of error should not be considered and the judgment should be affirmed because of appellant's willful disregard of the rules of this court.

2. That the trial court correctly construed the contract.

3. That the instructions were proper under the law and the evidence.

4. That there was no error in the admission of testimony or the rulings of the court thereof.

5. That the verdict of the jury is amply supported by the evidence and was proper and just under the law and the evidence.

6. That appellant has failed to establish any grounds warranting reversal.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 13389

United States
Court of Appeals
for the Ninth Circuit

ROLLEY, INC.,

Appellant,

vs.

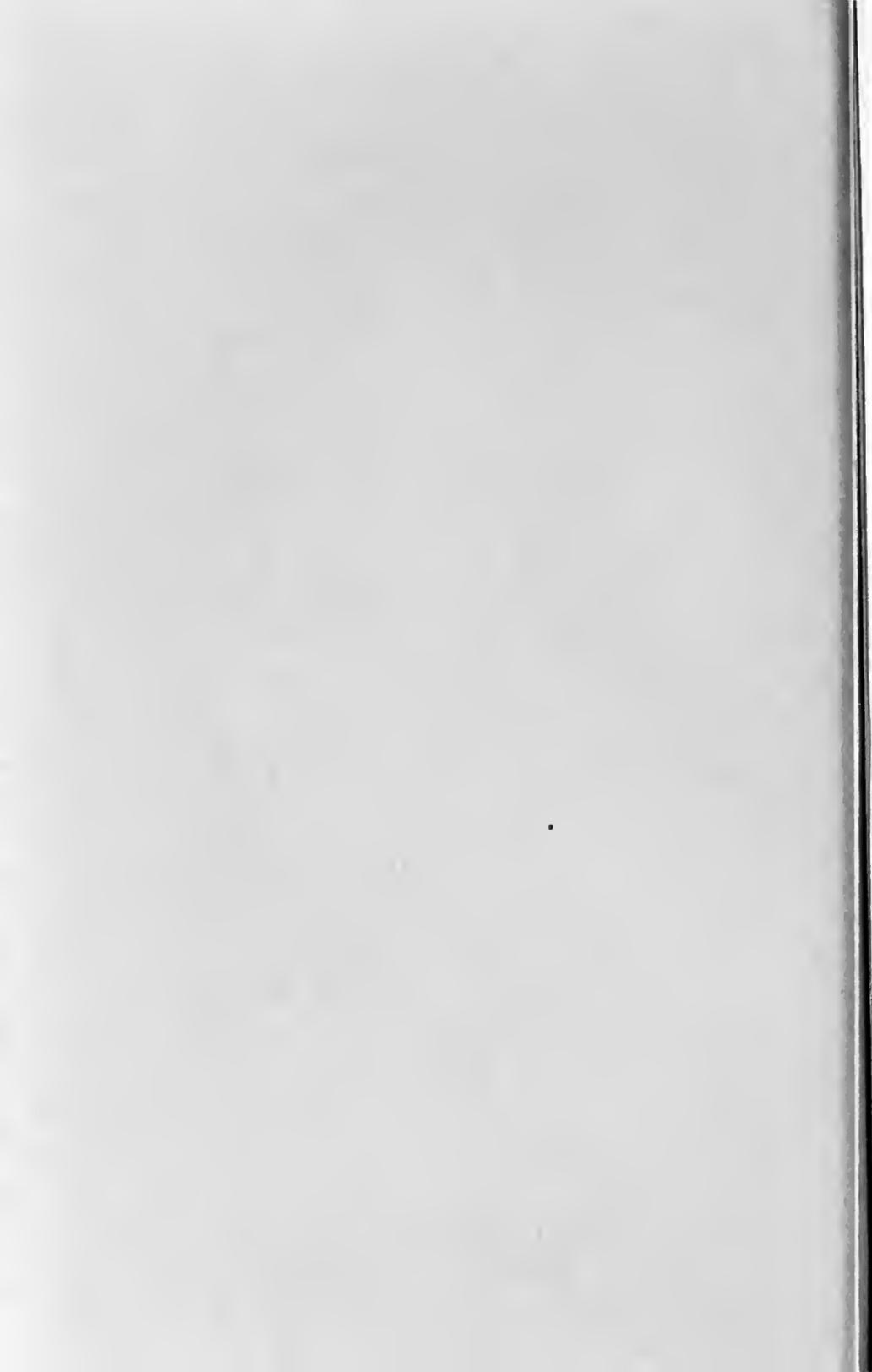
JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics and Les Par-
fums de Dana, Inc.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED
NOV 11 1932
PAUL P. O'BRIEN
CLERK



No. 13389

United States
Court of Appeals
for the Ninth Circuit

ROLLEY, INC.,

Appellant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
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fums de Dana, Inc.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

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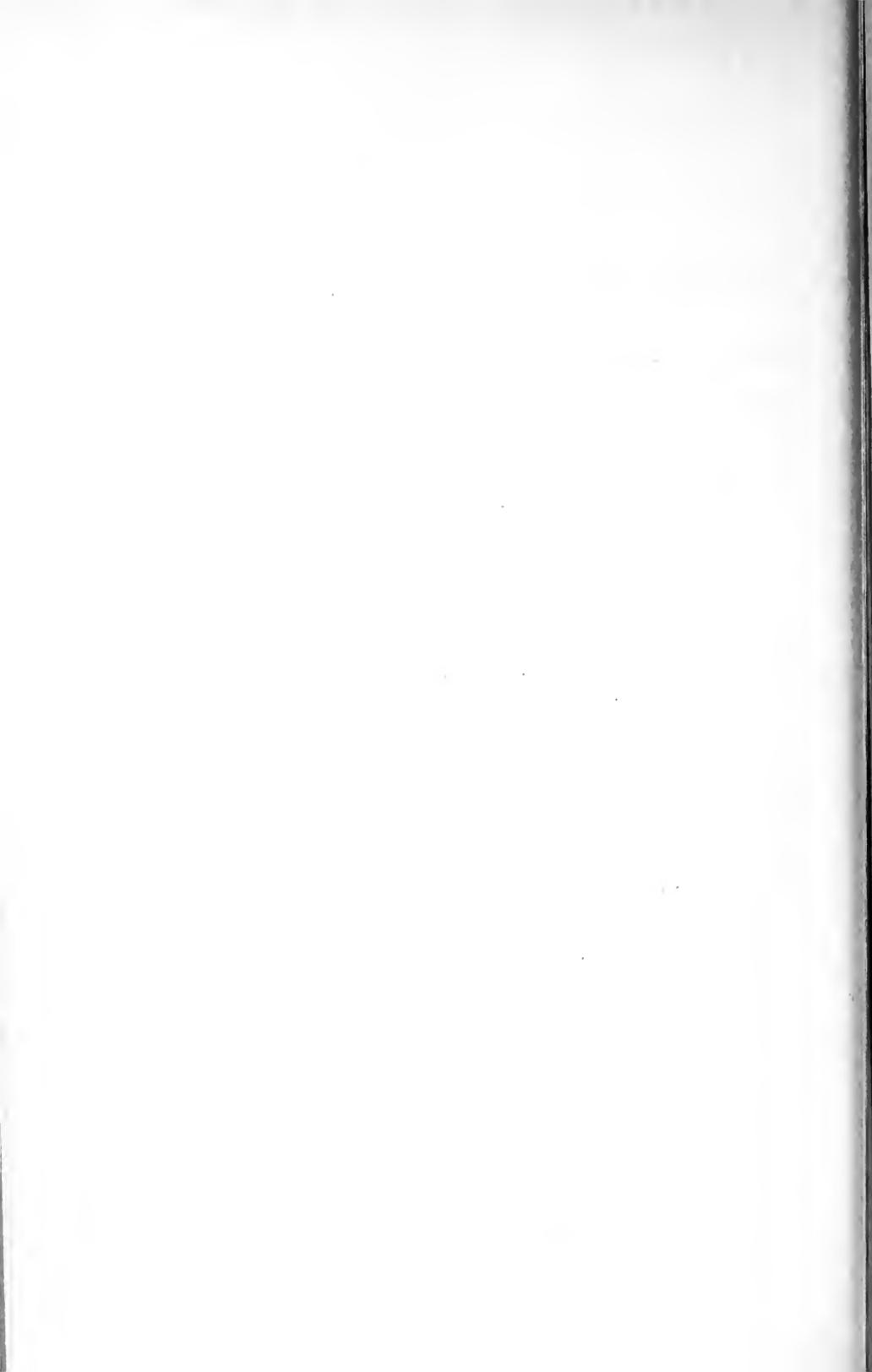
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In the United States District Court
Northern District of California
Southern Division

Civil Action No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics,

Plaintiff,

vs.

ROLLEY, INC.,

Defendant.

COMPLAINT FOR INJUNCTION, PROFITS
AND DAMAGES FOR TRADE MARK IN-
FRINGEMENT AND UNFAIR COMPETI-
TION

1. Plaintiff, James L. Younghusband and Howard Younghusband, both residents and inhabitants of the State of Illinois, co-partners doing business as Consolidated Cosmetics, said firm having its principal place of business in Chicago, Illinois, complains against Rolley, Inc., a corporation organized and existing under the laws of the State of California and having its principal place of business at San Francisco, California, a resident and inhabitant of the State of California, and doing business at 182 Geary Street, San Francisco, California, within the Northern District of California, Southern Division.

2. This is an action under the trade mark laws of the United States and between citizens of different states, in which the amount in controversy ex-

ceeds, exclusive of interest and costs, the sum of \$3,000.00.

3. Plaintiff is now, and its predecessors before it, have for many years been engaged in the creation, distribution and sale of cosmetics and toilet preparations, and particularly perfumes.

4. Plaintiff is now using and it and its predecessors before it have continuously used the trade marks Tabu, Taboo, Forbidden and Voodoo for many years last past on toilet preparations, cosmetics and perfumes.

5. Plaintiff's said cosmetics and perfumes have maintained the highest degree of quality so that plaintiff's products have acquired an excellent reputation, and plaintiff enjoys a business good will of great value.

6. Plaintiff is now and has been for some time last past the owner of said trade marks Tabu, Taboo, Forbidden and Voodoo and registrations Nos. 314,493, 407,797, 426,323, 343,897, 437,162, 408,529 and 363,746 therefor, issued by the United States Patent Office, and registrations Nos. 27,543, 30,388 and 32,733 issued by the Secretary of State of California, together with the good will of the business and that of its predecessors, and said registrations are valid, subsisting, uncancelled and unrevoked.

7. Plaintiff's said products bearing the aforesaid trade marks Tabu, Taboo, Forbidden and Voodoo have been for many years and are now extensively and nationally advertised and sold, and sales have

been continuously made and are now being made throughout the United States, with the result that said trade marks have become and are identified and associated with plaintiff and its products, and are understood to mean to the trade and the public that products sold under or in connection with said trade marks are the products of plaintiff.

8. Because of the extensive sale, the widespread advertising and the high quality of plaintiff's Tabu, Taboo, Forbidden and Voodoo cosmetic preparations and perfumes, plaintiff owns a valuable asset in the good will associated therewith.

9. Long after plaintiff had established its property rights in its said trade marks Tabu, Taboo, Forbidden and Voodoo, defendants began to advertise and sell and plaintiff is informed and believes that defendant is now selling perfumes and colognes being the trade marks Voodoo and Forbidden Flame perfume and cologne not originating with plaintiff, at and from its store at 182 Geary Street, San Francisco, California, in infringement of plaintiff's said trade marks and defendant is selling said perfumes and colognes as and for plaintiff's genuine Tabu, Taboo, Forbidden and Voodoo perfumes and colognes in unfair competition with plaintiff.

10. The said perfumes and colognes sold by defendant are merchandise of the same descriptive properties as plaintiff's perfume and cosmetics covered by plaintiff's said registrations.

11. The trade marks Voodoo and Forbidden Flame used on and in connection with the said per-

fumes sold by defendant, are used without license or permission of plaintiff, and are colorable imitations and infringements of plaintiff's registered trade marks Tabu, Taboo, Forbidden and Voodoo and said registrations therefor. Such infringing trade mark use and unfair presentation of defendant's said perfumes and colognes to the trade and the purchasing public are calculated to and do create confusion and mistake and cause purchasers to accept defendant's said products as and for plaintiff's products and are calculated to and do cause others handling defendant's said goods to pass them off on the consuming public as and for plaintiff's products, and said acts constitute infringement of plaintiff's products and plaintiff's registered trade mark rights and unfair competition with plaintiff.

12. Defendant's said perfumes are inferior in quality to plaintiff's products and are sold at greatly reduced prices, thereby aggravating the infringement and unfair competition, to plaintiff's greater loss and damage.

13. Defendant, well knowing the premises, and in violation of plaintiff's rights, have, in this District of California, and elsewhere in the United States, deliberately, wantonly and wrongfully committed the acts of trade mark infringement and unfair competition herein complained of on a large and growing scale, and is still so doing and threatening so to do in the immediate future, and plaintiff is still being and will be as long as such acts continue, greatly and irreparably damaged.

Wherefore plaintiff requests:

1. The usual process be issued directed to said defendant commanding it to appear before this Honorable Court on a day certain, there to answer make, and abide the further order of the Court.

2. The issuance of a preliminary injunction during the pendency of this suit and then a permanent injunction restraining and enjoining said defendant, its agents, servants, employees, attorneys and those in active concert or participation with it from in any way, directly or indirectly:

(a) infringing plaintiff's trade marks Tabu, Taboo, Forbidden and Voodoo in the manner herein complained of, or in any manner;

(b) using Forbidden Flame or Voodoo or any designation confusingly similar thereto on or in connection with perfumes, colognes, or any other goods of the same descriptive properties;

(c) reproducing, counterfeiting, copying or colorably imitating without the consent of plaintiff, plaintiff's trade marks Tabu, Taboo, Forbidden or Voodoo and applying or affixing the same to any labels, bottles, or other receptacles, cards, display devices, lists, circulars, signs, prints, packages, wrappers or other things intended to be used upon or in connection with the sale of perfume, cologne or other toilet preparations, and using any such reproduction, counterfeit, copy or colorable imitation in the advertising, offering for sale, selling or distributing of such products;

(d) making, selling, advertising, exhibiting, displaying, offering or announcing for sale, supplying

or distributing perfume or goods of a similar or related kind having applied to the containers, or packages thereof, the designation Forbidden Flame or Voodoo any colorable imitation of plaintiff's trade marks Tabu, Taboo, Forbidden or Voodoo;

(e) making any use of Forbidden or Voodoo orally or in writing save on or in connection with Tabu, Taboo, Forbidden or Voodoo perfume or other toilet preparations originating with plaintiff, and contained in the original sealed retail packages of the plaintiff, as placed on the market by plaintiff;

(f) filling any orders calling for or requesting Tabu, Taboo, Forbidden or Voodoo perfume, or other goods of the same descriptive properties except with the products originating with plaintiff and contained in the original sealed retail packages of the plaintiff as placed on the market by the plaintiff;

(g) preparing, or having prepared, any list including the words Taboo, Tabu, Forbidden or Voodoo or offering, presenting, giving, mailing, sending, publishing or circulating such list to anyone.

3. That said defendant be ordered to deliver up under oath to plaintiff for impounding and destruction, all articles herein held to infringe plaintiff's said trade marks Tabu, Taboo, Forbidden or Voodoo or in unfair competition therewith or in unfair competition with plaintiff, including all trade marks, labels, bottles, cartons, boxes, containers, wrappers, display stands, cards, lists, placards, circulars, radio scripts, together with all plates, molds,

matrices and other instruments and means for making such infringing and unfair copies, and to turn over to plaintiff all of each of defendant's books and records, including ledger accounts and invoices of each of defendant's infringing and unfair sales.

4. That defendant be required by decree of this Honorable Court to account for and pay over to plaintiff such gains and profits as would have accrued to plaintiff but for the unlawful doings of said defendant and all damages that it may have suffered or sustained thereby, and that this Honorable Court may increase the actual damages so assessed against said defendant to a sum equal to three times the sum of such assessment, in view of the wanton and deliberate character of said defendant's trade mark infringement and unfair competition.

5. That full costs be allowed to plaintiff.

6. That plaintiff may have such other and further relief as to the Court may seem fit.

CONSOLIDATED COSMETICS

/s/ By JAMES R. McKNIGHT,
Attorney

/s/ WILLIAM G. MacKAY,
Attorneys for the Plaintiff.

/s/ ROBERT C. COMSTOCK,
/s/ JAMES R. McKNIGHT,
Of Counsel.

[Endorsed]: Filed May 8, 1950.

In the United States District Court
For the Northern District of California,
Southern Division

No. 29739

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics,

Plaintiff,

vs.

ROLLEY, INC.,

Defendant.

ROLLEY, INC.,

Cross-Complainant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated, Cosmetics, DANA,
Cross-Defendant.

MOTION FOR LEAVE TO FILE CROSS-COM-
PLAINT AND BRING IN ADDITIONAL
PARTIES

Comes now the defendant and cross-complainant in the above entitled action and respectfully moves the above entitled Court for permission to file a cross-complaint and bring in the additional and further parties, as follows, to wit: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, Sak's, Emporium, Macy's, Hale Bros., City of Paris, H. Liebes & Co., Capwell's, J. Magnin's,

Raphael Weill & Company, White House, Weinstock Lubin, Bon Marche, Appleton & Co., Capwell, Sullivan & Furth's, Kahn's, all in the state of California, on motion and for an order directing the Clerk of this Court to issue a summons direct to each and all of the said cross-defendants requiring them to answer the cross-complaint.

/s/ HARRY GOTTESFELD,

/s/ J. A. BROWN,

/s/ JOHN J. NOONAN,

Attorneys for Defendant and
Cross Complainant.

It is so ordered.

Dated: June 7th, 1950.

/s/ HERBERT W. ERSKINE,

Judge, United States District Court, Northern District of California, Southern Division.

[Endorsed]: Filed June 7, 1950.

[Title of District Court and Cause]

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Rolley, Inc., and denies, admits and alleges as follows:

1.

Admits the allegations of Paragraph 2 of Plaintiff's Complaint;

2.

Denies that the plaintiff herein and/or its predecessors before it have continuously used the tradename "Voodoo" for many years past or otherwise since recently on toilet preparations, cosmetics and perfumes, and denies they have used it on either or any of said products or otherwise or at all until recently;

3.

Denies the allegations of Paragraph 5 of plaintiff's complaint;

4.

Denies that plaintiff is now or for some time past or otherwise or at all has been an owner of the tradename "Voodoo" and alleges that if any Letters Patent or Registrations have issued covering or comprehending this by the United States Patent Office or if the word "Voodoo" has been registered in the office of the Secretary of State of California it has been done illegally and in violation of the continuous prior use of the tradename "Voodoo" by the predecessor of this defendant and by this defendant who is now and for many years continuously, immediately last past, has been the sole owner of the word "Voodoo" and in this behalf that the prior use, by this defendant and its predecessor of the tradename "Voodoo" invalidates any and all trademarks or registrations thereof by the plaintiff herein, and that any such registration of the word "Voodoo" either in the United States Patent Office or in the office of the Secretary of State of California, is invalid for and on account of the fact that

this defendant and its predecessor have continuously used and employed the name "Voodoo" in like kind of products such as perfume, colognes and cosmetics, and the said name belongs to and is the property of this defendant and that any registration thereof in the United States Patent Office or in the office of the Secretary of State of California is void and of no force or effect for and on account of such prior use and employment thereof by this defendant and its predecessor and further this defendant avers and alleges that its predecessor and this defendant have continuously used and employed the word "Voodoo" on its cosmetics and perfumes and colognes and has built up a substantial business in the same and good will therefor and that its property therein is endangered by the transgression of its rights, illegally registered in the United States Patent Office or in the office of the Secretary of State of California, of the said word "Voodoo" and its use on competing products by the plaintiff herein.

5.

Answering the said complaint in paragraph 7 thereof, with respect to the word "Voodoo," the defendant alleges that it has not sufficient information or belief on this subject to enable it to answer, and placing its denial on that ground denies each and all of the allegations of paragraph 7 in relation to the word "Voodoo." In this behalf does aver that this defendant has never used or employed or claimed to use or employ the words Tabu or Taboo or Forbidden and makes no claim to any right or title in

and to the use of said names or tradenames and alleges that it does not use or employ or has it ever used or employed the tradenames Tabu or Taboo or Forbidden in any manner or form.

6.

Answering paragraph 8, denies all of the allegations therein with respect to the tradename "Voodoo."

7.

Answering paragraph 9, denies each and all of the allegations thereof and in reference thereto alleges that this defendant and its predecessor have rightfully, legally and properly and as its property used and employed the word "Voodoo" on its perfumes, colognes and cosmetics many years prior to any illegal use and employment of the word "Voodoo" by the plaintiff and alleges that in truth and in fact the plaintiff is illegally using and employing the tradename "Voodoo" on its perfumes and colognes in unfair competition with this defendant and in the transgression of its rights based upon continuous and prior use and employment of that term in its business and affairs.

8.

Answering paragraph 11, denies that it now uses or has ever used the trademarks Forbidden, Forbidden Flame or Tabu or Taboo in any manner or form; with respect to the word or tradename "Voodoo" this defendant denies that its use thereof and the sale of its products and perfumes are without

right; admits that it uses the word or tradename "Voodoo" without license or permission of the plaintiff and alleges that this defendant requires no license or permission of the plaintiff to so use the same by reason of prior and continuous use it is the property of the defendant and that any use or employment of the tradename "Voodoo" by the plaintiff or any of its customers is a violation and transgression of the rights of this defendant and the plaintiff in respect to the use of the tradename "Voodoo" does so as unfair competition with this defendant in violation of its prior rights thereto; denies all of paragraph 11 with respect to the word "Voodoo" and alleges that this defendant does not use or employ that word on perfumes which are a colorable imitation and/ (or) infringement of plaintiff's alleged registered trademark on "Voodoo" or said alleged illegal, invalid and unlawful registration thereof; denies all of paragraph 11 between the word "Such" on line 18 to and including the word "plaintiff" on line 27 of said paragraph 11 on page 3;

9.

Denies each and all of the allegations of paragraph 12;

10.

Denies each and all of the allegations of paragraph 13 except that this defendant admits that it does use and will continue to use and this defendant and its predecessor have for many years used the word "Voodoo" on its perfumes, colognes and cosmetic products and does so as a matter of right be-

cause of a long sustained prior public use thereof on its merchandise.

And further answering said complaint and by way of cross-complaint avers and alleges:

1.

That the defendant and cross-complainant herein Rolley, Inc., is now and ever since the 30th day of April, 1946, has been a corporation duly organized and existing under and by virtue of the laws of the state of California and having its principal place of business in the city and county of San Francisco; that prior to the organization of said corporation C. A. Rolley was the owner of the business now operated by this corporation under the name and style of Rolley's Perfumes and that he was then engaged in the business of the manufacture and sale of perfumes, colognes and cosmetics and related products; that the said Rolley's Perfumes, so operated by said C. A. Rolley was engaged in business under the said name and style of Rolley's Perfumes continuously for about six years and during said period and commencing on or about the 15th day of April, 1940, created, used and employed the name "Voodoo" in the manufacture and sale of perfumes and colognes and that products under that name and style were manufactured and distributed by him generally throughout the states of California, Oregon, Washington and the District of Columbia and that by reason of the exploitation and advertising of said products, perfumes and colognes under the name of "Voodoo" he acquired large and substantial good

will and said name became, was and is of great value in connection with the sale of perfumes and colognes under that tradename; that upon the formation of this corporation at said date the business of C. A. Rolley under the said name and style of Rolley's Perfumes was sold and transferred to this defendant and cross-complainant and it ever since has been and now is the owner and holder thereof and it has succeeded to and taken over the said tradename of "Voodoo" and has generally continued the operation of said business formerly operated and conducted by the said C. A. Rolley under the name and style of Rolley's Perfumes and has continued to publish and advertise the said name and used and employed it on the sale of its perfumes and colognes and that it is the sole owner of said name and solely entitled to use and employe the same as hereinafter set forth and alleged.

2.

That Rolley, Inc., is a corporation, existing under and by virtue of the laws of the State of California, having its principal place of business at 182 Geary Street, San Francisco, California, complains against James L. Younghusband and Howard Younghusband, both residents and inhabitants of the State of Illinois, co-partners doing business as Consolidated Cosmetics and Dana; said firm having its principal place of business in Chicago, Illinois.

3.

That beginning on or about the 15th day of April, 1940, this defendant and cross-complainant and its

predecessor have been the owners of the tradename "Voodoo" and have used and employed that tradename on its perfumes, cosmetics and other products and have sold the same publicly throughout the west and elsewhere and therefrom have ever since been and now are the legal and lawful owners of the said tradename "Voodoo" in so far as the same relates to such products as perfumes, colognes and cosmetics in all of their varying types, forms and descriptions.

4.

That the plaintiff and cross-defendant herein, James L. Younghusband and Howard Younghusband, doing business as Consolidated Cosmetics and Dana have wrongfully taken and used and employed the word "Voodoo" in violating and transgressing a long-established right of this defendant and cross-complainant in and to the said trade name and have wrongfully procured to be registered the said tradename in the United States Patent Office and in the office of the Secretary of State of California with full knowledge that so doing was wrongful and unfair competition and a transgression of and in violation of the rights of this defendant and cross-complainant in and to the said tradename "Voodoo."

5.

That the plaintiff and cross-defendant herein has in furtherance of its purpose to violate and transgress the rights of the defendant and cross-complainant of and to the said tradename "Voodoo" and to unfairly compete with this defendant and

cross-complainant in the use of said tradename sold competitive products under the said tradename "Voodoo" to the following corporations and individuals doing business in the State of California, to wit: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, all in Los Angeles; Sak's, Wilshire Blvd., Beverly Hills; Emporium, Macy's, I. Magnin's, Hale Bros., City of Paris, H. Liebes & Co., J. Magnin's, Raphael Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell, Sullivan & Furth, Capwells, Kahn's and I. Magnin's, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento; that each and all of said corporations herein so designated at all of the times have been and now are corporations organized and existing by virtue of the laws of the State of California and owning offices and places of business therein;

6.

That ever since the 15th day of April, 1940, hereinbefore stated defendant and cross-complainant and its predecessor have been and still are the sole proprietors and owners of the tradename "Voodoo" and all right, title and interest in and to the same.

7.

That within two years immediately last past the plaintiff and cross-defendant and the other cross-defendants have infringed and violated the said tradename of this defendant and cross-complainant and have engaged in unfair competition with it by

wrongfully using and employing the said tradename "Voodoo" upon its perfumes, colognes and cosmetics and by selling them to each and all of the corporations herein named and to others elsewhere in the United States and causing them to sell the same and place the same upon the market in unfair competition with this defendant and cross-complainant and in violation and transgression of its rights and property in and to the said tradename "Voodoo" and that the said plaintiff and cross-defendant and the other cross-defendants herein named will, unless enjoined and restrained by this Court, continue to use and employ the said tradename in violation of the rights of this defendant and cross-complainant and notwithstanding that they have been advised and warned to cease and desist from the use and employment of the word "Voodoo" have continued to use the same and will continue so to use and employ.

8.

That the said plaintiff and cross-defendant and the other cross-defendants herein have violated the rights of the defendant and cross-complainant and have willfully and wrongfully committed the acts of tradename infringement and unfair competition and will continue so to do to the irreparable loss, injury and damage of this defendant and cross-complainant unless they are enjoined and restrained from so doing; that the defendant and cross-complainant has been damaged and seriously injured in its business and rights by the said unfair competition and asks that the sum and amount thereof be ascertained and

determined by this Court by the determination of the sales made by all of the cross-defendants herein and by others elsewhere in the United States and the plaintiff and the cross-defendants to the end that the amount, extent and nature of the damage be fixed and determined.

* * * * *

/s/ HARRY GOTTESFELD,

/s/ J. A. BROWN,

/s/ JOHN J. NOONAN,

Attorneys for Defendant and
Cross-Defendant.

Duly verified.

[Endorsed]: Filed June 7, 1950.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

To Rolley, Inc., and Harry Gottesfeld, Joseph A. Brown and John J. Noonan, its attorneys:

Please take note that on Monday, October 9, 1950, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the above-entitled Court, in the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, plaintiff will move this Court for a preliminary injunction, for the reasons set forth in the attached motion, the affidavit of John D. Gaumer, and in the attached

brief in support of plaintiff's motion for a preliminary injunction.

/s/ WILLIAM G. MacKAY,
/s/ JAMES R. McKNIGHT,
/s/ ROBERT C. COMSTOCK,
Attorneys for Plaintiff

Acknowledgment of Service attached.

MOTION FOR PRELIMINARY INJUNCTION

Comes now plaintiff herein and moves that a preliminary injunction be entered restraining and enjoining defendant from bringing, threatening to bring or prosecuting any lawsuits against plaintiff's customers or prospective customers or adding or proceeding against them as cross-defendants to any cross-complaint filed by defendant in this suit and for cause plaintiff shows:

1. The affidavit of John D. Gaumer shows that plaintiff filed its complaint herein alleging ownership of the trade mark Voodoo for perfume and that defendant had infringed this trade mark by selling perfume not originating with plaintiff bearing the trade mark Voodoo. Exhibit A is a copy of plaintiff's registration of the trade mark Voodoo, No. 363,746 issued by the United States Patent Office on January 3, 1939.

2. The affidavit further shows that defendant filed a cross-complaint alleging that it owned the trade mark Voodoo but claiming no priority of use

over plaintiff's registration No. 363,746 but alleging that plaintiff had infringed its alleged common law rights.

3. Defendant obtained an ex parte order without notice on June 7, 1950 adding 21 of plaintiff's customers as parties-defendant to defendant's cross-complaint, for the same cause of action as defendant alleged in its cross-complaint against plaintiff.

4. The affidavit shows that defendant's attitude is to threaten plaintiff's customers by adding 21 of them to the cross-complaint and the defendant may file suits against substantially all of plaintiff's customers and prospective customers.

5. Plaintiff has been put to great expense, annoyance and harassment by the actions of defendant and may be required to furnish indemnity **agreements to its customers** and to undertake the defense of such customers in this suit and in further suits which defendant may bring against plaintiff's customers.

6. Plaintiff has been and is being greatly and irreparably damaged by the threats of defendant in adding 21 of its customers to defendant's cross-complaint in this case and the expectation of other suits and will continue to be so damaged unless defendant is enjoined by this Court. Plaintiff is financially responsible and defendant will not suffer any damage or loss by the entry of such an injunction **which will serve to protect the jurisdiction** of this Court and to save plaintiff and its customers for improper and unfair harassment and injury.

Wherefore plaintiff prays that the attached injunction should be entered herein.

/s/ WILLIAM G. MacKAY,
/s/ JAMES R. McKNIGHT,
/s/ ROBERT C. COMSTOCK,
Attorneys for Plaintiff

AFFIDAVIT OF JOHN D. GAUMER

State of Illinois,
County of Cook—ss.

John D. Gaumer, being first duly sworn deposes and says that he is Manager of Consolidated Cosmetics, the plaintiff in the above entitled case; that prior to the filing of the complaint in this case that he had read said complaint and knew that the facts stated therein were true; that plaintiff and its predecessors before it have for many years been engaged in the creation, distribution and sale of perfumes and cosmetics; that plaintiff has maintained the highest degree of quality in its cosmetics and perfumes so that plaintiff's products have acquired an excellent reputation and plaintiff enjoys a business good-will of great value; that plaintiff and its predecessors have continuously used the trade mark Voodoo on and in connection with perfume and other cosmetics; that plaintiff's predecessors obtained registration No. 363,746 for the trade mark Voodoo on perfume and other cosmetics from the United States Patent Office on January 3, 1939 on an application filed September 10, 1938; and that at the time of the filing of the complaint, plaintiff was the

owner of the trade mark Voodoo for perfume and other cosmetics and said United States registration therefor, No. 363,746, as well as registration No. 32733 issued to it by the Secretary of State of the State of California, and that said registrations are valid, subsisting, uncanceled and unrevoked. A copy of plaintiff's United States registration No. 363,746 is attached hereto and made a part hereof as Exhibit 1.

Affiant further states that Plaintiff's Voodoo perfume has been so extensively and nationally advertised and sold throughout the United States, including the State of California, that the trade mark Voodoo as alleged in the complaint has become identified and associated with plaintiff.

Affiant further states that it has distributed its Voodoo perfume through department and drug stores and that among its customers are the following: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, all in Los Angeles; Sak's, Wilshire Blvd., Beverly Hills; Emporium, Macy's, I. Magnin's, Hale Bros., City of Paris, H. Liebes & Co., J. Magnin's, Raphael Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell, Sullivan & Furth, Capwells, Kahn's and I. Magnin's, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento.

Affiant further states as alleged in the complaint that long after plaintiff had established its prop-

erty rights in its said trade mark Voodoo that defendant began to advertise and sell perfume and cologne bearing the trade mark Voodoo which did not originate with plaintiff and which defendant sold at and from its store at 182 Geary Street, San Francisco, California, in infringement of plaintiff's said trade mark.

Affiant further states that in paragraph 5 of its cross-complaint, defendant alleges the following:

“That the plaintiff and cross-defendant has in furtherance of its purpose to violate and transgress the rights of the defendant and cross-complainant of and to the said trade-name ‘Voodoo’ and to unfairly compete with this defendant and cross-complainant in the use of said trade-name sold competitive products under the said trade-name ‘Voodoo’ to the following corporations and individuals doing business in the State of California, to wit: I. Magnin’s, Bullock’s, Owl Drug Company, Robinson’s, Haggerty, all in Los Angeles; Sak’s, Wilshire Blvd., Beverly Hills; Emporium, Macy’s, I. Magnin’s, Hale Bros., City of Paris, H. Liebes & Co., J. Magnin’s, Raphael Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell, Sullivan & Furth, Capwells, Kahn’s and I. Magnin’s, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento; that each and all of said corporations herein so designated at all of the times have been and now are corporations organized and existing by virtue

of the laws of the State of California and owning offices and places of business therein;”

On June 7, 1950, the Court entered an *ex parte* order obtained without notice to plaintiff, approving the following motion of plaintiff:

“Comes Now the defendant and cross-complainant in the above entitled action and respectfully moves the above entitled Court for permission to file a cross-complaint and bring in the additional and further parties, as follows, to wit: I. Magnin’s, Bullock’s, Owl Drug Company, Robinson’s, Haggerty, Sak’s, Emporium, Macy’s, Hale Bros., City of Paris, H. Liebes & Co., Capwell’s, J. Magnin’s, Raphael Weill & Company, White House, Weinstein Lubin, Bon Marche, Appleton & Co., Capwell, Sullivan & Furth, Kahn’s, all in the state of California, on motion and for an order directing the Clerk of this Court to issue a summons direct to each and all of the said cross-defendants requiring them to answer the cross-complaint.”

Plaintiff promptly filed a motion to set aside the *ex parte* order entered June 7, 1950 among other grounds on the ground that plaintiff will be seriously damaged and injured if this order is not set aside. The order names a total of 21 of the leading drug and department stores throughout the entire State of California as defendants to the cross-complaint. Plaintiff believes that defendant’s purpose is to harass plaintiff and its customers. It is further noted that many of the defendants are not even within this judicial district and are not

subject to suit in this Court. The bringing of suits against customers of a manufacturer constitutes unfair competition and is not proper where the Court already has jurisdiction of the real parties to the controversy.

Affiant further states that all of the stores named in paragraph 5 of the cross-complaint and in the ex parte order entered June 7, 1950 are all plaintiff's customers and each and all of them have purchased plaintiff's Voodoo perfume. Affiant believes that none of these 21 stores is a customer of defendant. Defendant has endeavored to add 21 of plaintiff's customers to this suit as a threat to the entire industry and indicates an intention on the part of defendant to sue other of plaintiff's customers in this suit and other suits to be filed. This is solely for the purpose of harassing plaintiff and unfairly preventing the sale of plaintiff's merchandise by intimidating its dealers.

Affiant states that if any of plaintiff's customers are served as parties-defendant to this or any other suit, or are threatened with suit, that they will either discontinue selling plaintiff's Voodoo perfume or demand protection by a satisfactory bond at plaintiff's expense and require plaintiff in effect to substitute itself for the customer sued. Any threat of suit would have the effect of causing others who hear of the threats to immediately discontinue plaintiff's line. If a large number of plaintiff's customers were sued, such as the 21 customers named in the cross-complaint, the effect

would be ruinous to plaintiff's business. All such customers, and others hearing of it, would drop plaintiff's products or require plaintiff to put up expensive bonds and engage in a multiplicity of defenses. Since defendant has the plaintiff in court for any claim it desires to assert against plaintiff, no good cause may be served by any one of plaintiff's customers being sued, either in this suit or any other suit.

Plaintiff is a well-established and nationally known concern and is fully responsible to respond in this suit to any action brought by the defendant in its cross-complaint, and defendant will be fully protected in whatever rights it has in the trade mark as against the plaintiff, who is the manufacturer and distributor, without resorting to adding any of plaintiff's customers in this suit or suing any of plaintiff's customers in any other suit.

/s/ JOHN D. GAUMER

Subscribed and sworn to before me this 7th day of August, 1950.

[Seal] /s/ EVELYNNE G. KLEPAL

EXHIBIT No. 1

Registered Jan. 3, 1939 Trade-Mark 363,746

Republished, under the Act of 1946, Aug. 9, 1949,
by Consolidated, Cosmetics, Chicago, Ill.

United States Patent Office
Associated Distributors, Inc., Chicago, Ill.

Act of February 20, 1905

Application September 10, 1938, Serial No. 410,423

VOODOO

Statement

To the Commissioner of Patents:

Associated Distributors, Inc., of Chicago, Illinois, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, doing business at 11 East Hubbard Street, Chicago, Illinois, has adopted and used the trade-mark shown in the accompanying drawing, for Lipstick, Rouge, Face Powder, Eyelash and Eyebrow Mascara, Pads Impregnated with Suntan and Cleansing Lotion, Creams for the Hands and Face; Preparations for Skin, Hair and Fingernails; and Perfumes, in Class 6, Chemicals, medicines, and pharmaceutical preparations, and presents herewith five specimens of the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905. The trade-mark has been continuously used and applied

to said goods in the business of applicant since April 10, 1937. The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown.

The undersigned hereby appoints James R. McKnight, whose postal address is One North La Salle Street, Chicago, Illinois, and who is registered in the United States Patent Office as No. 12,110, its attorney, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate and to transact all business in the Patent Office connected therewith.

ASSOCIATED DISTRIBUTORS, INC.,
By J. L. YOUNGHUSBAND,
President.

INJUNCTION ORDER

This cause coming on to be heard on plaintiff's motion for preliminary injunction and sworn affidavit in support thereof and the Court having considered said motion and affidavit and the briefs of both parties and the record herein and being fully advised in the premises, and it appearing to the Court that plaintiff will be irreparably injured by the adding, or threatening to add or prosecuting plaintiff's customers in the cross-complaint in this case, or by the filing, threatening and prosecution of further suits by defendant against plaintiff's customers unless defendant is enjoined by this

Court, it is hereby ordered, adjudged and decreed that:

A writ of injunction issue enjoining and restraining defendant, its officers, agents, employees, attorneys and those in active concert or participation with it from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture, or of such customers to purchase, advertise, or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics.

It is further ordered that this injunction shall remain in full force and effect until the final determination of this cause.

.....

United States District Judge.

[Endorsed]: Filed Aug. 17, 1950.

[Title of District Court and Cause.]

INJUNCTION ORDER

This cause coming on to be heard on plaintiff's motion for preliminary injunction and sworn affidavit in support thereof and the Court having considered said motion and affidavit and the briefs of both parties and the record herein and being fully advised in the premises, and it appearing to the

Court that plaintiff will be irreparably injured by the adding, or threatening to add or prosecuting plaintiff's customers in the cross-complaint in this case, or by the filing, threatening and prosecution of further suits by defendant against plaintiff's customers unless defendant is enjoined by this Court, it is hereby ordered, adjudged and decreed that:

A writ of injunction issue enjoining and restraining defendant, its officers, agents, employees, attorneys and those in active concert or participation with it from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics.

It is further ordered that this injunction shall remain in full force and effect until the final determination of this cause.

Dated: December 28, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

Entered in civil docket Dec. 29, 1950.

[Endorsed]: Filed Dec. 28, 1950.

[Title of District Court and Cause]

ANSWER TO CROSS COMPLAINT

Comes now James L. Younghusband and Howard Younghusband, co-partners, doing business as Consolidated Cosmetics, plaintiff and makes the following answer to the cross complaint filed herein by defendant Rolley, Inc.

1. Plaintiff admits that Rolley, Inc., is a corporation, organized and existing under the laws of the State of California with its principal place of business in San Francisco and that C. A. Rolley was the owner of the business now operated by Rolley, Inc. and that he was then engaged in the business of the manufacture and sale of perfumes and colognes. Further answering paragraph 1 of the cross complaint, plaintiff is without knowledge or information sufficient to form a belief as to whether or not Rolley, Inc. was organized on April 30, 1946, or that C. A. Rolley was engaged in business under the name and style of Rolley's Perfumes continuously for about six years, and plaintiff denies that C. A. Rolley during said six year period, or commencing on or about April 15, 1940 created or used or employed the name Voodoo in the manufacture or sale of perfumes or colognes or that products under that name or style were manufactured and distributed by him generally or otherwise throughout the states of California, Oregon, Washington or the District of Columbia or that by reason of the alleged exploitation or alleged advertising of said alleged

products, perfumes or colognes under the name of Voodoo he acquired large or substantial or any good will or said name became, was or is a great or any value in connection with the sale of perfumes or colognes under that tradename or that Rolley, Inc. has succeeded to or taken over the said tradename Voodoo or has acquired any rights in and to said trade mark, or has continued to publish or advertise said trade mark or that it is the sole owner or any owner of the trade mark Voodoo or solely or otherwise entitled to use it, and plaintiff leaves defendant Rolley, Inc. to its strict proof thereof.

2. Plaintiff answering paragraph 2 of the cross complaint admits that Rolley, Inc. is a California corporation with its principal place of business at 182 Geary Street, San Francisco, California and that James L. Younghusband and Howard Younghusband are co-partners doing business as Consolidated Cosmetics with its principal place of business in Chicago, Illinois.

3. Plaintiff answering paragraph 3 of the cross complaint denies that defendant cross-complainant or its predecessor or either of them has ever been or is now the owner of the trade mark or trade name Voodoo. Plaintiff admits that defendant and C. A. Rolley have sold perfume and cologne bearing the trade mark Voodoo in infringement of plaintiff's registered trade mark Voodoo but plaintiff denies that beginning on or about the 15th day of April, 1940, this defendant and cross-complainant or its predecessor have been the owners of the trade

name Voodoo, have sold Voodoo perfumes, cosmetics and other products publicly throughout the west or elsewhere or have been or are now the legal or lawful owners of the said trade name Voodoo in so far as the same relates to such products as perfumes, colognes or cosmetics in all of their varying types, forms and descriptions.

4. Plaintiff answering paragraph 4 of the cross complaint denies that it has wrongfully taken or used or employed the word Voodoo or has violated and transgressed a long established or any right of the defendant in or to the said trade name or has wrongfully procured to be registered the said trade name in the United States Patent Office or in the office of the Secretary of State of California with full knowledge that so doing was wrongful or unfair competition or a transgression of or in violation of the rights of defendant in and to the said trade name Voodoo and plaintiff alleges that its registrations of the trade mark Voodoo No. 363,746 issued by the United States Patent Office and No. 32,733 issued by the Secretary of State of California were rightfully and legally obtained and that defendant had no right to the trade mark Voodoo at the time of said registrations or at any time and has now no right to the trade mark Voodoo or to contest or challenge the right of plaintiff thereto.

5. Answering paragraph 5 of the cross complaint, plaintiff denies that it has any purpose to or does violate or transgress any rights of the defendant and denies that defendant has now or ever has had

any rights to the trade mark Voodoo, and plaintiff denies that any use of the trade mark Voodoo that it has made violates or transgresses any rights of defendant or competes unfairly with defendant. Plaintiff further alleges that it has sold perfume and cologne bearing the trade mark Voodoo to the corporations and individuals named in paragraph 5 of the cross complaint but not in competition with defendant, because defendant is not now selling and plaintiff is informed and believes has never sold any perfumes or colognes to said corporations and individuals.

6. Answering paragraph 6 of the cross complaint, plaintiff denies that since April 15, 1940 or any other time, defendant or its predecessor have been or still are the sole or any proprietors or owners of the trade mark or trade name Voodoo or all or any right, title or interest therein and plaintiff alleges that prior to April 15, 1940 when defendant claims to have created, adopted and first used the trade mark Voodoo, plaintiff's predecessor was the owner of the then existing registration No. 363,746 for the trade mark Voodoo issued by the United States Patent Office on January 3, 1939.

7. Answering paragraph 7 of the cross complaint, plaintiff denies that within the last two years or at any time has it infringed or violated any trade name of defendant or engaged in unfair competition with it by using or employing the trade name Voodoo upon its perfumes, colognes or cosmetics or by selling them to each or all of the corporations herein

named or to others elsewhere in the United States or causing them to sell the same or place the same upon the market in alleged unfair competition with defendant or in alleged violation or transgression of any alleged rights or property in and to the said trade name Voodoo and plaintiff further alleges that its use of its registered trade mark Voodoo on its perfumes and colognes is lawful and proper and in no way a violation of any rights of defendant.

8. Answering paragraph 8 of the cross complaint, plaintiff denies that it has violated any rights of defendant or has willfully or wrongfully committed any acts of trade name infringement or unfair competition or will continue so to do to the irreparable loss, injury or damage of defendant unless enjoined or restrained from so doing. Plaintiff denies that defendant has been damaged or injured in its business or rights by any unfair competition or acts by plaintiff and plaintiff further denies that defendant has been injured or damaged to any amount and leaves defendant to its strict proof thereof.

9. Further answering the cross complaint, plaintiff alleges that defendant has infringed plaintiff's registered trade mark Voodoo and other trade marks as set forth in the complaint in this case and that defendant and/or its predecessor C. A. Rolley have long copied the well known trade marks of famous perfume houses and come into Court with unclean hands.

Wherefore plaintiff requests that the cross complaint be dismissed at defendant's cost.

JAMES L. YOUNGHUSBAND and
HOWARD YOUNGHUSBAND, do-
ing business as Consolidated Cos-
metics.

/s/ By JAMES R. McKNIGHT,
Attorney.

/s/ WILLIAM G. MacKAY,
Attorney.

/s/ ROBERT C. COMSTOCK,
Of Counsel.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 16, 1951.

[Title of District Court and Cause]

SUPPLEMENTAL ORDER

The injunction order issued by this Court on December 28th, 1950, is hereby amended by the addition of the following paragraph:

“In accordance with Rule 65(c) of the Federal Rules of Civil Procedure plaintiff shall give security in the sum of \$500.00, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”

Dated: January 30th, 1951.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed Jan. 30, 1951.

[Title of District Court and Cause]

WRIT OF INJUNCTION

To Rolley, Inc. Greeting:

Whereas, by an order entered herein on December 28, 1950, it appears to the court that plaintiff will be irreparably injured by the adding, or threatening to add or prosecuting plaintiff's customers in the cross-complaint in this case, or by the filing, threatening and prosecution of further suits by defendant against plaintiff's customers unless defendant is enjoined by this court.

Now, therefore, we do hereby command and strictly enjoin and restrain you, the said Rolley, Inc., your officers, agents, employees, attorneys and those in active concert or participation with you from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics, until the final determination of this cause, upon the filing and undertaking executed by an approved surety company in the sum of \$500.00, which has been duly filed and approved by the Court.

Which commands and injunctions you are respectfully required to observe and obey until our said District Court shall make further order in the premises.

In the United States District Court
Northern District of California,
Southern Division

Civil Action No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics, and LES PAR-
FUMS de DANA, Inc.,

Plaintiffs,

vs.

ROLLEY, INC.,

Defendant.

FINAL JUDGMENT

This cause coming on to be heard, and the Court being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Decree:

FINDINGS OF FACT

1. Plaintiffs James L. Younghusband and Howard Younghusband are both residents and inhabitants of the State of Illinois, co-partners doing business as Consolidated Cosmetics, said firm having its principal place of business in Chicago, Illinois, and plaintiff Les Parfums de Dana, Inc., is a New York corporation have its principal place of business in New York, New York.

2. Defendant, Rolley, Inc., is a California corporation with its principal address at San Francisco, California.

3. Plaintiff Les Parfums de Dana, Inc., has

adopted and used, is now using and is the sole and lawful owner of the trade mark Voodoo for perfumes, colognes and other cosmetics and registration No. 363,746 of January 3, 1939, therefore issued by the United States Patent Office on said date, and is the successor to plaintiffs James L. Young- husband and Howard Younghusband doing business as Consolidated Cosmetics, who were the owners of the said trade mark Voodoo at the time of the filing of the complaint herein.

4. Plaintiffs' said products bearing said trade mark have been and are now extensively advertised and sold in interstate commerce so that said products bearing said trade mark are well and favorably known and are understood by the trade and public to be the plaintiffs' products.

5. Said defendant Rolley, Inc., has at dates later than the first use of the trade mark Voodoo by plaintiffs and without plaintiffs' consent used the trade mark Voodoo on and in connection with the sale of perfume and toilet water, which were not products of plaintiffs.

6. The said use of plaintiffs' trade mark by said defendant in connection with said defendant's offering for sale and sale of perfume and toilet water not originating with plaintiffs is likely to cause confusion in the minds of the purchasing public and has caused injury to the plaintiffs.

7. Plaintiffs James L. Younghusband and Howard Younghusband doing business as Consolidated Cosmetics have adopted and used, are now using and are the sole and lawful owners of the trade marks

Tabu, Taboo and Forbidden for perfumes, colognes and other cosmetics, and registrations Nos. 314,493 of July 3, 1934; 407,797 of June 27, 1944, and 426,323 of December 24, 1946, for Tabu, Nos. 343,897 of March 9, 1937, and 437,162 of March 9, 1948, for Taboo and No. 408,529 of August 15, 1944, for Forbidden, all issued by the United States Patent Office on said respective dates.

8. The defendant having abandoned the trade mark Forbidden Flame and discontinued its use, there is no need for any further finding of fact or order thereon.

CONCLUSIONS OF LAW

9. This Court has jurisdiction of the plaintiffs and the said defendant and over the controversy involved in this action.

10. The trade mark Voodoo used by plaintiff Les Parfums de Dana, Inc., on perfumes, colognes and other cosmetics and registration No. 363,746 therefor issued by the United States Patent Office and owned by said plaintiff is good and valid in law.

11. Said defendant, Rolley, Inc., has infringed plaintiffs' said registered trade mark Voodoo by the use of the Voodoo trade mark on and in connection with the offering for sale and the sale of perfume and toilet water not originating with plaintiffs and without plaintiffs' consent, and said defendant has engaged in unfair competition with plaintiffs in offering for sale and selling perfume and toilet water as and for Voodoo, which did not originate with plaintiff.

12. Plaintiffs are entitled to a permanent injunc-

tion against said defendant to restrain said trade mark infringement and unfair competition.

DECREE

It is hereby ordered, adjudged and decreed:

13. That said defendant, Rolley, Inc., its respective agents, officers, servants, employees and attorneys and all persons in active concert or participation or privity with it is hereby forever enjoined and restrained from in any way, directly or indirectly:

(a) infringing plaintiffs' registered trade mark *Voodoo* by using *Voodoo* or any other trade mark confusingly similar thereto on or in connection with perfumes, colognes, cosmetics, or any other goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services;

(b) selling, offering for sale or advertising perfume, cologne, or other goods of the same descriptive properties bearing the trade mark *Voodoo*;

(c) making any use of *Voodoo* orally or in writing, except in connection with the original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(d) filling any orders calling for or requesting *Voodoo* cologne, or other goods of the same descriptive properties except with the products originating with plaintiffs and contained in the complete un-

opened original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(e) preparing any list including the trade mark Voodoo or offering, presenting, giving, mailing, sending, publishing or circulating such list to anyone.

14. That the plaintiffs be discharged from the bond on the preliminary injunction provided for in the order of Judge Erskine of December 28, 1950, and that said injunction be made permanent and final "enjoining and restraining defendant, its officers, agents, employees, attorneys and those in active concert or participation with it from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics."

15. That the defendant deliver up to plaintiff's counsel all labels, signs, prints, advertising leaflets, catalogs, price lists, packages, wrappers, receptacles and other things, and all plates, molds and other devices for making the same, in the possession or under the control of the defendant which unlawfully bear the designation Voodoo.

16. That defendant's cross-complaint herein be dismissed.

17. That there is no award of damages to plaintiffs.

18. That defendant pay the taxable costs of this action to plaintiffs.

Dated: This 21st day of March, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1952.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now Comes the defendant and cross-complainant Rolley, Inc., and respectfully moves the Court for an order granting a new trial and for a new trial in the above-entitled action after entry of judgment and decree perpetually enjoining defendant and **cross-complainant** from using a trade name and mark adopted and owned by it and directing defendant and cross-complainant to deliver certain of its property to plaintiffs and for costs, on each of the following grounds, namely:

I.

The evidence is insufficient to justify the judgment, including, but not limited to, findings respectively numbered 3, 4, 5 and 6.

II.

The judgment is contrary to the evidence, including, but not limited to, the findings thereof respectively numbered 3, 4, 5 and 6.

III.

The judgment is contrary to law and equity, and more particularly in that it would declare valid and protectible by injunctive processes of the Court a trade name and mark resting entirely upon registration with appropriate agencies of the United States of America, but not with those of the States of California, Washington, Oregon, Nevada, the territories of Alaska and Hawaii or the District of Columbia—(1) without any evidence whatever of actual use of the trade name and mark in said places above named or elsewhere; (2) without any pretended use of the trade name and mark for more than four years after registration; (3) when a pretended use for less than two years was voluntarily abandoned without lawful excuse or explanation and remained so abandoned for more than three and one-half years and six years prior to the commencement of the instant action, and (4) in the face of cross-complainant's lawful appropriation and extensive, open, notorious and continuous use of the trade name and mark, as shown by undisputed and unquestioned documentary evidence, for more than five years prior to the commencement of the action following the appropriation and prior use theretofore of the trade name and mark by plaintiff's predecessor in interest for more than

three years, as shown by such documentary evidence, such use having been made, generally and throughout the states, territories and other places above named;

IV.

Irregularities in the proceedings of the Court and on the part of plaintiffs by which cross-complainant was prevented from having a fair trial, including, but not limited to: (1) the presentation and receipt of evidence respecting asserted conduct by the predecessor in interest of cross-complainant, relating to (a) other and unrelated trade names and marks asserted by plaintiffs and (b) asserted trade names and marks not owned or claimed by any party, or any predecessor in interest of any party, to the action; (2) the overruling of cross-complainant's timely and valid objections to the offering and receipt of such evidence; and (3) the denial of cross-complainant's timely and appropriate motion to deny said evidence;

V.

The judgment and decree includes unnecessary and mischievous recitals of purported fact, including, but not limited to, those set forth in paragraphs 7 and 8 of the findings therein, which are also contrary to the unconflicting evidence in that such establishes: (1) that neither cross-complainant nor its predecessor in interest has ever used any of the trade names or marks set forth in paragraph 7 of

said findings; (2) that the appropriation and use of the trade name and mark Forbidden Flame was, in fact, adopted and used by cross-complainant's predecessor in interest prior to any asserted registration or use of the trade name and mark Forever referred to therein; and (3) cross-complainant has not at any time used any of the names, or any name bearing any resemblance to any of the names, set forth in paragraphs 7 and 8 of said findings;

VI.

The conclusions of law in paragraph 9 through 12 set forth in said decree are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VII.

The provisions of paragraph 13 through 14 are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity.

VIII.

The provisions of paragraph 15 of the said judgment and decree is erroneous and would unconstitutionally deprive cross-complainant of its property and require the delivery of the same to plaintiffs without consideration and without due process of law;

IX.

The judgment and decree would erroneously di-

rect the dismissal of the cross-complaint herein of defendants and cross-complainant;

X.

The judgment and decree would erroneously provide for the imposition of costs upon the cross-complainant, whereas a substantial and major portion of the relief herein sought by plaintiffs will have been denied plaintiffs and a major portion of such costs relate to issues as to which such relief will have been so denied;

Said motion is made and based upon the grounds hereinabove set forth and is made and based upon the pleadings, the transcript of the testimony and oral proceedings, heretofore transcribed and filed herein, and the documentary evidence received upon this written motion and a notice of time and place of hearing the same and upon each of the whole thereof.

HARRY GOTTESFELD,
JOSEPH A. BROWN,
HUTCHINSON & QUATTRIN,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Defendant and
Cross-Complainant

Points and Authorities

Rule 59 of the Rules of Civil Procedure: Sections: 14202, 14270, 14400 of the Business and Professions Code of the State of California.

Rainier Brewing Co. vs. McCalgon, 94 C. A. (2d) 118, 121. 52 Am. Jur. 572, Trade-marks, par 90.

Respectfully submitted,

HARRY GOTTESFELD,
HUTCHINSON & QUATTRIN.
/s/ J. ALBERT HUTCHINSON,
Attorneys for Defendant and
Cross-Complainant

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 31, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL

Plaintiffs respond as follows to the like numbered paragraphs of defendant's motion for a new trial.

I.

Plaintiffs deny that the evidence is insufficient to justify the Final Judgment entered herein including findings 3, 4, 5 and 6.

II.

Plaintiffs deny that the Final Judgment entered herein, including findings 3, 4, 5 and 6, is contrary to the evidence.

III.

Plaintiffs deny that the Final Judgment entered herein is contrary to law or equity. All of defend-

ant's argument in its paragraph III was made in open court at the final hearing and in defendant's 63 page brief.

IV.

Plaintiffs deny that there were any irregularities in the proceedings of the Court or on the part of the plaintiffs, by which defendant was prevented from having a fair trial. The trial was not before a jury, and the Court did not improperly admit evidence, nor improperly overrule defendant's objections to admitting evidence, nor improperly deny defendant's motions on admitting evidence, nor give unfair weight or consideration to evidence. The Court's rulings were consistent with justice. The Court and plaintiffs committed no errors, but if any errors were made, they were harmless errors and under Rule 61 of the Rules of Civil Procedure are not a ground for granting a new trial. Defendant's arguments were previously presented at the trial, at the final hearing and in its brief and present nothing new.

V.

Plaintiffs deny that any recitals, including paragraphs 7 and 8 in the Final Judgment herein are unnecessary or mischievous, or contrary to the evidence. Defendants again are reiterating matters previously argued.

VI.

Plaintiffs deny that Conclusions 9 through 12 of the Final Judgment herein are contrary to the evidence, the law, or principles of equity.

VII.

Plaintiffs deny that Conclusions 13 through 14 of the Final Judgment herein are contrary to the evidence, the law or principles of equity.

VIII.

Plaintiffs deny that paragraph 15 of the Final Judgment herein is erroneous or would unconstitutionally deprive defendant of property and require delivery of same without consideration and due process of law.

IX.

Plaintiffs deny that the Final Judgments herein is erroneous in dismissing defendant's cross complaint.

X.

Plaintiffs deny that the Final Judgment herein is erroneous in imposing costs on defendant.

Plaintiffs state that the Final Judgment entered herein sufficiently and properly set forth the ultimate facts, conclusions of law and decree based upon the proceedings at the trial which lasted three days in open court, on the final arguments of counsel, and on the briefs filed by counsel for both parties herein. Plaintiffs further state that all of defendant's arguments in its motion for new trial have been previously argued, considered and properly ruled upon by the Court and disposed of by the Final Judgment. Wherefore plaintiffs submit that any further presentation by defendant should

be by way of appeal and that the motion for new trial, being without basis, should be denied.

/s/ JAMES R. McKNIGHT,
/s/ ROBERT C. COMSTOCK,
/s/ WILLIAM G. MacKAY,
Attorneys for Plaintiffs

[Endorsed]: Filed April 7, 1952.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics, and Les Par-
fums de Dana, Inc.,

Plaintiffs,

vs.

ROLLEY, INC.,

Defendant.

ORDER

This cause coming to be heard on defendant's motion for a new trial, and the court being fully advised in the premises, it is hereby ordered that:

The defendant's motion is denied.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Dated April 15th, 1952.

[Endorsed]: Filed April 15, 1952.

[Title of District Court and Cause.]

WRIT OF INJUNCTION

To Rolley, Inc., a California corporation of San Francisco, California, and to your agents, officers, servants, employees, and attorneys, and all persons in active concert or participation of privity with you and to each and every one of you, Greeting:

Whereas, it has been represented to the Honorable Michael J. Roche, Judge of the District Court of the Northern District of California, Southern Division, on the part of James L. Younghusband and Howard Younghusband, co-partners doing business as Consolidated Cosmetics and Les Parfums de Dana, Inc., a New York corporation, complainants in their certain complaint, exhibited in said District Court, before said Judge of said Court, against you, the said Rolley, Inc., to be relieved touching the matters complained of. In which said complaint it is stated, among other things, that your actings and doings in the premise are contrary to equity and good conscience. And it being ordered that a writ of **Permanent Injunction** issue out of said Court, upon said complaint, enjoining and restraining you, and each of you, as prayed for in said complaint; We, therefore, in consideration thereof, and of the particular matters in said complaint set forth, do strictly command you, the said Rolley, Inc., and each and every one of you, that you be hereby forever enjoined and restrained from in any way directly or indirectly,

(a) infringing plaintiff's registered trade mark

Voodoo by using Voodoo or any other trade mark confusingly similar thereto on or in connection with perfumes, colognes, cosmetics, or any other goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services;

(b) selling, offering for sale or advertising perfume, cologne, or other goods of the same descriptive properties bearing the trade mark Voodoo;

(c) making any use of Voodoo orally or in writing, except in connection with the original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(d) filling any orders calling for or requesting Voodoo cologne, or other goods of the same descriptive properties except with the products originating with plaintiffs and contained in the complete unopened original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(e) preparing any list including the trade mark Voodoo or offering, presenting, giving, mailing, sending publishing or circulating such list to anyone;

(f) adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the

plaintiffs to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiffs' Voodoo perfume, cologne or other cosmetics.

You are hereby ordered and directed to deliver up to plaintiffs' attorneys, all labels, signs, prints, advertising leaflets, catalogs, price lists, packages, wrappers, receptacles, and other things, and all plates, molds, and other devices for making the same, in the possession or under the control of the defendant, which unlawfully bear the designation Voodoo.

Hereof fail not, under the penalty of what the law directs.

To the Marshal of the Northern District of California, Southern Division, to execute, and return in due form of law.

Witness, The Hon. Michael J. Roche, Judge of the Northern District of California, Southern Division, at San Francisco, California, this 15th day of April, in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the United States of America, the year.

[Seal] /s/ C. W. CALBREATH,

Clerk

/s/ By MARGARET P. BLAIR,

Deputy

Return on Service of Writ attached.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

To the Plaintiffs and Cross-Defendants James L. Younghusband and Howard Younghusband, and to William G. MacKay, Esq., and McKnight and Comstock, Their Attorneys:

You, and Each of You, Will Please Take Notice that defendant and cross-complainant Rolley, Inc., intends to, and it does hereby, appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the judgment made and entered in the above entitled Court on the 24th day of March, 1952, in favor of plaintiffs and cross-defendants in said action and against defendant and cross-complainant therein, and from the order denying motion for new trial made and entered in the above entitled Court on the 15th day of April, 1952, and from the whole thereof.

Dated this 28th day of April, 1952.

HARRY GOTTFELD,
JOSEPH A. BROWN,
HUTCHINSON & QUATTRIN,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Defendant and
Cross-Complainant

Acknowledgment of Service attached.

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys herein:

Complaint for injunction, etc.

Motion for leave to file cross-complaint and bring in additional parties and order allowing.

Answer and cross-complaint.

Motion to vacate order permitting defendant to bring in additional parties and to strike portions of cross-complaint.

Motion for preliminary injunction.

Order vacating order of June 7, 1950, and denying motion to strike in part.

Order granting preliminary injunction.

Answer to cross-complaint.

Order amending order for injunction.

Undertaking on injunction.

Writ of injunction.

Motion to add party plaintiff.

Stipulation for addition of party plaintiff.

Order adding party plaintiff, etc.

Plaintiffs' request for admissions under Rule 36.

Reply to request for admissions under Rule 36.

Findings of Fact, Conclusions of Law, and Final Decree.

Motion for a new trial.

Plaintiffs' response to defendant's motion for new trial.

Order denying motion for new trial.

Writ of injunction.

Notice of Appeal.

Request for transcript of record on appeal.

Appellees' designation of additional records on appeal.

Reporter's transcript, November 14, 15, 16, 1951.

Reporter's transcript, April 11, 1952.

Plaintiffs' Exhibits 1 to 101.

Defendant's Exhibits A to Z, A-1 to J-1.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 20th day of May, 1952.

[Seal]

C. W. CALBREATH,
Clerk

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as CONSOLIDATED COSMETICS, and
LES PARFUMS de DANA, INC.,
Plaintiffs,

vs.

ROLLEY, INC.,

Defendant.

REPORTER'S TRANSCRIPT

Proceedings of November 14, 15 and 16, 1951

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiffs: McKnight and Comstock by James R. McKnight, Esq., William G. MacKay, Esq. For the Defendant: J. Albert Hutchinson, Esq., and Harry Gottesfeld, Esq. [1*]

Mr. McKnight: Your Honor, please, this is a trademark infringement case involving really four trademarks, the most important of which are the trademarks "Voodoo" and "Tabu" for perfume. The plaintiff, James L. Younghusband and Howard Younghusband, are partners forming the firm of Consolidated Cosmetics, a Chicago firm that distributes these perfumes. The defendant, Rolley,

* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

Inc., is a California Corporation, and we allege is selling perfumes bearing trademarks which are infringements of the trademarks we own. [2]

One of the trademarks that the defendant, Rolley, Inc., is using is the trademark "Voodoo" on perfume which is identical with the trademark "Voodoo" of the plaintiff. The other trademark, "Forbidden Flame," we allege is an infringement of the trademark "Forbidden," which is also owned by the plaintiff.

The plaintiff owns three trademarks which are very closely related in meaning. One is the word "Tabu," spelled T-a-b-u, and "Taboo," spelled T-a-b-o-o, and the trademark "Forbidden," all of which mean the same thing. The trademark "Tabu" also has heavy advertising in which the expression "Tabu, the forbidden perfume," is used. The defendant, we allege, has infringed these trademarks by the selling of the "Forbidden Flame" perfume, which, by the way, was put out as a reproduction.

The plaintiff will show that it has registrations of these trademarks in the United States Patent Office. These registrations are set forth in the complaint. The registration of "Tabu—T-a-b-u" goes back to 1934. The registration of "Voodoo" goes back to January 3, 1939. The defendant's answer includes a counter claim or a counter complaint alleging that they have prior use of the trademark "Voodoo" and therefore that the plaintiff is infringing their trademark rights, which are solely common law rights.

In the answer the date set forth for the defendant's claim [3] of use of Voodoo is April 15, 1940, which is later than the registration date of the plaintiff's Voodoo, which is January 3, 1939. So we have an instance of where the counter claim is apparently improper and should be dismissed on its face.

As your Honor knows, there has been a new Trademark Act passed and is now in effect, called the Act of 1946, or the Lanham Act. That Lanham Act, or Act of 1946, succeeded the Act of 1905 under which trademarks were registered in the United States Patent Office. All of plaintiff's registrations have been reaffirmed or re-registered under the Lanham Act, so that we are now entitled to all the provisions of this new Trademark Act. I say that because in some instances the protection afforded by the Act of 1946 is believed to be greater than that given plaintiffs under the Act of 1905.

The Court: Does the substantive Act of 1946 embody the substantive law of 1905?

Mr. McKnight: Partially. Largely.

The Court: What is the difference, if any?

Mr. McKnight: I think in some instances infringement can be found where the mark is used not on the goods, but in connection with the sale of the goods, advertising over the radio, or where there has been a standard on a counter, let's say, in the City of Paris someone left a standard—that isn't pertinent to this case, but let's say there is a standard there with the word Voodoo on it, that would be [4] considered an infringement under the

Lanham Act, whereas it might not be considered a case of trademark infringement under the Act of 1905. In those days it was considered unfair competition rather than technical trademark infringement. But I think this case is one of technical trademark infringement because of the registrations involved, although there is some feature of unfair competition, too.

Title to the trademarks is set forth in the complaint and established in the plaintiff's proof. I won't go into detail except to say that when I read the deposition it will show title to the registrations.

Now, on the parties to this suit, a new party has been made to this suit, Les Parfums de Dana, Associated, with Consolidated Cosmetics. Title to the trademark Voodoo at the present time is in the name of Les Parfum de Dana, but under the Act which is pertinent relating to the consideration of the matter of use there is inter relationship.

Plaintiff's perfumes and cosmetics are sold all over the United States. They are sold in such famous stores as the City of Paris, Emporium, I. Magnin's, Roos Brothers, Rafael Weil, Macey's, Hale Brothers, H. Liebes & Company, J. Magnin's, White House, and all Owl Drug Stores in San Francisco.

In Oakland our customers include H. C. Capwell, Sullivan & Furth, I. Magnin, J. Magnin, Kuhn's, and many others. In Los Angeles, Robinson's, Bullock's, Magnin's, [5] the Broadway, the May Company, Owl Drug, Whelan Stores, Eastern Columbia, Haggerty's, and Sak's Fifth Avenue. The plain-

tiff's Voodoo and Forbidden perfumes are sold throughout the United States in practically every store and every drug store and every department store in the country. The sales of these perfumes has exceeded \$32,000,000. We feel there is hardly a woman in the United States who has not heard of these perfumes. In addition, the plaintiff has had national distribution and advertised the perfumes in such national magazines as Harper's Bazaar, Town & Country, Vogue, and practically every metropolitan newspaper in the United States. Many of those advertisements will be offered in evidence, had been taken in the depositions, and established substantially \$3,000,000 have been spent in advertising plaintiff's trademark products.

As we have said before the registrations will be offered in evidence, and we feel that the registrations are prima facie evidence of title and ownership.

The defendant and its predecessor, Charles A. Rolley, President of Rolley Products, Inc., admit in a discovery deposition that reproductions has been put out by Rolley and were intended to be copies of well known perfumes. **In Exhibit 1** there are some 29 reproductions of perfumes, in which such famous names as Mandalay, which belonged to Powers; Ballet, belonging to Hudnut; "Wicked," belonging to Peggy Sage; Curtain Call, belonging to Marie; Forbidden, belonging [6] to the plaintiff; White Christmas, belonging to Caron, and Claire de Lune, belonging to Colgate. All of these were copies of famous perfumes and famous perfume

names. Coty even stopped Rolley in one instance from copying the Coty name.

Rolley has admitted a trademark is an important adjunct in the selling of perfume. To women the trademark is what they go by in buying perfume, especially in repeated orders and in telling others. And it is important to note the defendant admits that it has done itself no advertising of Voodoo or its perfumes. It merely sells perfume from one place. It has made some sales in interstate commerce, but these sales have been largely from a store here on Geary Street in San Francisco. Naturally the defendant doesn't need to do any advertising of Voodoo, when he can ride on the coat tails of the plaintiff.

In the event the defendant claims to have prior use, even though it is pleaded later than plaintiff's registration, we say that that proof should be by the preponderance. The authorities so state, and I have a short trial brief to hand to your Honor, which has some of the basic authorities. Where it puts the burden of proof is on the junior party and all doubts must be resolved against him.

Another interesting thing is that in Mr. Rolley's discovery deposition he was asked: [7]

"Q. So that all the information you have is oral, only from your memory in regard to those early sales of Voodoo? "A. That's right.

"Q. You don't have any written documents on the subject at all? "A. No.

"Q. Do you have any record of sales?

"A. No.

“Q. Do you have any ledger?”

“A. Not that far back, no; I wouldn’t keep my books after so many years.”

We feel, under those circumstances, defendant’s defense and defendant’s counter claim is fallacious and should be dismissed.

The plaintiff’s trademarks have been adjudicated by many courts, and we have quoted some of them, some of the adjudications.

We feel under the circumstances the proof will show that the plaintiff has established its trademark rights, and that the defendant has infringed, and the plaintiff is entitled to a decree. I have made these opening remarks rather brief because I feel it will be repeated largely in the trial and the depositions.

Mr. Hutchinson: If the Court please, I think it would [8] be helpful to have brief statement from the defendant and cross complainant, *Rolley, Inc.*

As counsel has indicated that is a California corporation, incorporated in 1946, when it took over the business of Mr. Charles A. Rolley, who is also president of that company. Mr. Rolley entered the perfume business in 1933. It was a side business to another activity he had at that time, as the evidence will indicate, and it grew through the years. He was engaged in selling perfumes and in the use of many names including *Voodoo*.

Counsel has suggested that there is involved here some issue as to *Tabu* and some variants, and *Forbidden*. That is not the case. The cross complainant and defendant makes no claim to *Tabu*

as a trademark or name for perfume, and has not at any time during the case, and has not at any time sold any perfume whatever under the name Tabu or any of its variants.

The use of Forbidden Flame was made by Mr. Rolley prior to the incorporation of this company, so it has not been used for many years, long since the statute of limitations, assuming it did infringe, which we believe it does not. In other words, Forbidden Flame on a perfume is as much different from Tabu, described as a forbidden property, as any other trademark. However, we call attention to the fact it has not been used in many years by anybody connected with the cross complainant, [9] and it is not in issue, and merely clutters the record to drag it in.

The cross complaint, I believe, shows a use in 1940. The proof of the cross defendant will show a use of Voodoo as early as 1934, and I think I should advise the Court we will desire to amend the complaint—cross-complaint as made to make that change, because that will be our proof.

The comments of counsel were quite interesting to us in one respect. He did not indicate when, if ever, Voodoo was sold under that name in the West. And, if sold, when it was first so sold. I think it so well known as to be known to all lawyers that trademark registration means nothing unless there is a use, and if there is a prior use, then the registration is immaterial, and must in fact be cancelled by the prior user.

Rolley, Inc., and predecessor, Mr. Charles A.

Rolley, did not do a great deal of business any place else. Most of their business has been confined to the three Pacific Coast States of Washington, Oregon and California, the Hawaiian Islands, and to some extent the surrounding states of Nevada and Arizona. They have also done business in Washington, D. C., throughout the last several years.

Voodoo has not been registered, or any attempt to register it on behalf of cross complainant, but we will show use has been made of that name in conjunction with that perfume since 1934. Therefore, in the absence of any proof or [10] suggestion of proof on the part of the plaintiff here, it is quite obvious there isn't the suggestion of a case. Since the parties are here, and these are eastern firms, and it is desirable to use the cross complainant to have this matter settled we do not, however, move for non-suit; but we do call attention to the fact that have not suggested one thing that would give them right to any relief, namely, a prior use. They only claim registration in 1939. Registration would mean nothing unless there was a connecting use. And even then, defendant alleged in the cross complaint 1940, there is no suggestion they had used that name in conjunction with perfume within the area that the cross complainant was doing business even at that time.

I think that will give the Court an idea of our proof. We, of course, seek an injunction against their using a right which has been appropriated by the cross complainant on the name Voodoo. No claim is made to the others, and I think when the

time comes our objection to any offer of proof on those would be sustained.

The Court: What was your suggestion as to amendment?

Mr. Hutchinson: I would like to substitute in the cross complaint, wherever there is reference to the use of the name Voodoo in combination with perfume sales in the area therein described by the cross complaint, Rolley, Inc., and its predecessor in interest, Mr. Charles A. Rolley, the figure [11] 1934 be substituted for 1940.

The Court: Any objection?

Mr. McKnight: Yes, I do, because I don't think there is any basis for it. The amendment should have been made long ago instead of waiting for the day of trial. Even when the discovery depositions were taken, they showed 1938 as the earliest use.

This comes under the heading of surprise, unfair approach to the matter. I cannot believe they can produce any proof of 1934 in view of what took place at the discovery depositions which I am going to read, your Honor.

Mr. Hutchinson: If the Court please, the deposition referred to indicates 1938, which is much earlier than 1940, and they have been aware of that reference from the President of the plaintiff corporation, Mr. Rolley, for over a year. I think that is 1950.

Mr. McKnight: That is right.

Mr. Hutchinson: There is no surprise. We do, however, wish the Court to understand if they are in need of further evidence, if they require further

deposition we will be very pleased to stipulate in order that there be no disadvantage to them. However, the facts are the facts, and I think we have a right——

Mr. McKnight: (Interposing) I will accept that offer that we have a right to take further depositions on [12] anything beyond the pleadings, based on what might come up today of any claim of Voodoo prior to the date alleged in the answer and counter claim.

Mr. Hutchinson: My client, or Mr. Rolley, who is President of my client, advises me I am incorrectly informing the Court. The deposition said 1934, and that is more than a year ago, and it was a discovery at their request.

The Court: You may proceed. Have you any stipulations you can enter into in the interests of time, gentlemen, for the purpose of the record?

* * * * * [13]

“JOHN GAUMER

a witness called and examined by the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows: [14]

“Direct Examination

“By Mr. McKnight:

“Q1. Will you please state your name?

“A. John Gaumer.

“Q2. What is your address?

“A. My office is at 30 West Hubbard Street,

Chicago Illinois; my home address is 5556 South Mozart Street, Chicago 29, Illinois.

“Q3. What is your business?

“A. Cosmetics.

“Q4. At the time that the complaint was filed in this case by whom were you employed?

“A. I was employed by Consolidated Cosmetics and Dana Perfumes, Inc.

“Q5. What position do you now hold?

“A. I am manager at Consolidated Cosmetics.

“Q6. What are your duties?

“A. General executive duties. I am also in charge of the Legal Department, including supervision of trademark and patent work.

“Q7. Is that the same Consolidated Cosmetics that is the plaintiff in this case?

“A. Yes, it is.

“Q8. What is the legal form of Consolidated Cosmetics?

“A. It is a copartnership composed of James L. Younghusband and Howard Younghusband. [15]

“Q9. Is Consolidated Cosmetics the owner of any trademarks?

“A. Oh, yes. It is the owner of quite a number of trademarks.

“Q10. Will you give me some of the principal trademarks that are owned by the plaintiff in this case?

“A. Tabu, Taboo, Forbidden and Voodoo.

“Q11. Did Consolidated Cosmetics own the trademark Voodoo and registrations therefor at the time of the filing of the complaint in this case?

“A. Yes, and owned it prior to that date.

“Q12. Who owns the trademark Voodoo and registration therefor now?

“A. Les Parfums de Dana, Inc.

“K13. What is the legal form of Les Parfums de Dana, Inc.?

“A. It is a corporation chartered under the laws of the State of New York.

“Q14. Is that the same Les Parfums de Dana, Inc., that is now plaintiff in this case?

“A. Yes, it is.

“Q15. Are the trademarks Tabu, Taboo, Forbidden and Voodoo registered in the United States Patent Office? “A. Yes, they are.

“Q16. On what goods is the trademark Tabu used?

“A. On perfumes, colognes, face powders, lipsticks, [16] sachets, bath oil, soap and other toilet preparations.

“Q17. On what goods are the trademarks Taboo, Forbidden and Voodoo used?

“A. Substantially the same goods on which Tabu is used except sachets and bath oil.

“Q18. I will show you a document marked for identification Plaintiff’s Exhibit 2 and ask you if you can identify this document?”

Mr. McKnight: Should I pass these exhibits up to your Honor as we go along? A great deal of this is highly technical. Maybe I had better hand them up to your Honor so you can go through them as we proceed.

Mr. Hutchinson: Counsel, do you have a copy

of that? We don't seem to have a copy of the deposition. I thought we might follow the reading. Thank you.

Mr. McKnight: (Continuing reading).

“A. Yes. This is a soft copy of a registration 314,493, issued by the United States Patent Office July 3, 1934, on the trademark Tabu, registered to James L. Younghusband and republished under the Act of 1946, on March 9, 1948, by Consolidated Cosmetics, one of the plaintiffs in this case.”

Mr. McKnight: Your Honor, at this time I would like to substitute as Exhibit 2 a certified copy for the soft copy that was offered in evidence. Is that satisfactory? Subject to [17] correction if error should appear.

Mr. Hutchinson: Yes. With the exception that this relates, your Honor, to Tabu and we object on the ground it is incompetent, irrelevant and immaterial and without any issue in this case.

Mr. McKnight: In other words, he is objecting on the merits, which will have to be later determined after your Honor hears the evidence in the case. I merely want to substitute a certified copy for the soft copy.

Mr. Hutchinson: No objection on that ground, your Honor.

The Court: Let it be admitted and marked.

Mr. McKnight: May I asked this be marked Exhibit 2? I desire to offer No. 2 before No. 1, because Exhibit No. 1 is the only exhibit that will appear in the discovery deposition which I will read immediately following this deposition.

(Certified copy of Registration No. 314,493 was received in evidence as Plaintiff's Exhibit 2.)

Mr. McKnight: (Continuing reading).

"Q19. I show you a paper marked for identification Plaintiff's Exhibit 3 and ask you if you can identify this document.

"A. Yes, I can. It is a soft copy of registration number 407,797, issued by the United States Patent Office June 27, 1944, on the trademark Tabu, registered to [18] Associated Distributors, then a copartnership composed of James L. Younghusband, Howard Younghusband, Paul Rowatt and Walter A. Jordan, and republished under the Act of 1946, on June 14, 1949, by Consolidated Cosmetics, one of the plaintiffs in this case."

Mr. McKnight: I also at this time would like to offer in evidence as Plaintiff's Exhibit 3, certified copy of registration 407,797, subject to the same objection.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Certified copy of registration 407,797 was received in evidence and marked Plaintiff's Exhibit 3.)

Mr. McKnight: (Continuing reading).

"Q20. I show you a paper marked for identification Plaintiff's Exhibit 4, and ask you if you can identify this document?

"A. Yes, I can. This is a soft copy of registra-

tion No. 426,323, issued by the United States Patent Office on December 24, 1946, on the trademark Tabu, issued to Consolidated Cosmetics, a predecessor of one of the plaintiffs in this case and republished by Consolidated Cosmetics under the Act of 1946, on June 14, 1949, one of the plaintiffs in this case.”

Mr. McKnight: I now would like to offer a certified copy [19] in place of the soft copy of Registration No. 426,323, subject to the same objection.

Mr. Hutchinson: Can it be understood all these references to Tabu and Forbidden in the various exhibits will be offered by you, no objection made to the foundation, reserving the right for cross plaintiff's objection on competency and the issues point earlier made, and that will be to all of these?

Mr. McKnight: That may be understood without repetition.

The Court: Let the record so show.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

(Certified copy of Registration No. 426,323 was received in evidence and marked Plaintiff's Exhibit 4.)

Mr. McKnight: (Continuing reading).

“Q21. I show you another document, marked for identification Plaintiff's Exhibit 5, and ask you if you can identify this document?

“A. Yes. This is a soft copy of registration number 343,897, issued by the U. S. Patent Office

March 9, 1937, covering the trademark Taboo, issued to Associated Distributors, Inc., one of the predecessors of Consolidated Cosmetics, which is one of the plaintiffs in this case and republished under the Act of 1946 by Consolidated [20] Cosmetics, one of the plaintiffs in this case, on March 16, 1948.”

Mr. McKnight: May I offer this certified copy of Registration No. 343,897, in evidence in place of the soft copy?

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Certified copy of Registration No. 343,897 was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. McKnight: (Continuing reading).

“Q22. I show you a paper marked for identification Plaintiff's Exhibit 6 and ask you if you can identify this document?

“A. Yes, I can. It is a soft copy of registration 437,162, issued by the United States Patent Office March 9, 1948, one the trademark Taboo, issued to Consolidated Cosmetics, one of the predecessors of Consolidated Cosmetics, and plaintiff in this case, and republished under the Act of 1946 on June 14, 1949, by Consolidated Cosmetics, one of the plaintiffs in this case.”

Mr. McKnight: Your Honor, I would like to substitute and offer in evidence as Plaintiff's Exhibit 6, a certified copy of Registration 437,162.

The Court: Let it be admitted and marked. [21]

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

(Certified copy of Registration No. 437,162 was received in evidence and marked Plaintiff's Exhibit 6.)

Mr. McKnight: (Continuing reading).

"Q23. I call you attention to a paper marked for identification Plaintiff's Exhibit 7, and ask you if you can identify this document?

"A. Yes. It is a soft copy of Registration 408-529, issued by the United States Patent Office August 15, 1944, covering the trademark Forbidden, issued to Associated Distributors, Inc., one of the predecessors of Consolidated Cosmetics, which is one of the plaintiffs in this case. It was republished under the Act of 1946, on June 14, 1949, by Consolidated Cosmetics, one of the plaintiffs in this case."

Mr. McKnight: Your Honor, I would like to offer in evidence a certified copy of Registration No. 408,529 in lieu of the soft copy, as Plaintiff's Exhibit 7.

The Court: Plaintiff's Exhibit 7 admitted and filed in evidence.

(Certified copy of Registration No. 408,529 was received in evidence and marked Plaintiff's Exhibit 7.)

Mr. McKnight: (Continuing reading).

"Q24. I show you a document marked for iden-

tification [22] Plaintiff's Exhibit 8, and ask you if you can identify it.

"A. Yes. This is a soft copy of registration 363,746, issued by the United States Patent Office January 3, 1939, covering the trademark Voodoo, issued to Associated Distributors, Inc., one of the predecessors of Consolidated Cosmetics, which is one of the plaintiffs in this case and republished by Consolidated Cosmetics under the Act of 1946, on August 9, 1949."

Mr. McKnight: I would like at this time to offer in evidence certified copy of Registration No. 363,746, in lieu of the soft copy referred to in the deposition.

The Court: This is Voodoo?

Mr. McKnight: Yes.

Mr. Hutchinson: Same objection on that, your Honor, with this further qualification, that the registration without use does not prove any issue in the case, and would not sustain judgment for the plaintiff.

The Court: I don't follow that clearly.

Mr. Hutchinson: This is with relation to Voodoo and registration for Voodoo. We do not challenge they have the certificate here, and do not raise any objection as to the foundation, but we think it is incompetent, irrelevant and immaterial, because it does not establish the issues, which is prior use or, for that matter, any use. [23]

The Court: Let's pause for a moment and proceed with prior use. How can we reach it, assuming you are correct?

Mr. Hutchinson: The right to a trademark of this nature depends on the use of the——

The Court: I understand that. How am I to determine at this time, whether there was a use or non-use?

Mr. Hutchinson: That is true. I realize the evidence must come in piece by piece, but I would like to have that reservation reserved, if I may.

The Court: Very well, same objection will run to this.

Mr. Hutchinson: Yes. Thank you.

The Court: Let the record so show.

Mr. Hutchinson: Thank you, your Honor.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Certified copy of Registration No. 363,746 was received in evidence and marked Plaintiff's Exhibit 8.)

Mr. McKnight: (Continuing reading).

"Q25. Where did you obtain Plaintiff's Exhibits 2 to 8, both inclusive?

"A. From the United States Patent Office. They are official copies which are referred to as soft copies.

"Q26. Now, I call your attention to Plaintiff's Exhibit 2, and ask you who was the original registrant under [24] trademark Tabu?

"A. James L. Younghusband.

"Q27. Is that the same James L. Younghusband who is now one of the partners of Consolidated Cosmetics, the plaintiff in this case?

“A. Yes, the same person.

“Q28. Did James L. Younghusband use the trademark Tabu on cosmetics in 1934?

“A. He did. He used it on lipstick and rouge in 1934.”

The Court: We will take a recess.

(Short recess.)

Mr. McKnight: (Continuing reading).

“Q29. Now, I show you another document marked for identification Plaintiff’s Exhibit 9, and ask you if you can identify the signature thereon?

“A. Oh, yes. This is the signature of James L. Younghusband, which I have seen him sign literally thousands of times and I have no doubt about it.

“Q30. What trademark registration was covered by the assignment in Plaintiff’s Exhibit 9 for identification?

“A. The trademark Tabu, registered in the United States Patent Office July 3, 1934, under number 314,493.

“Q31. And to whom did James L. Younghusband assign [25] Tabu in said registration?

“A. To Tattoo, Inc., an Illinois corporation.

“Q32. Now, I show you a document marked for identification Plaintiff’s Exhibit 10 and ask you if you can identify the signature of the person who signed these papers?

“A. Yes, I can. It is the signature of C. C. Minogue.

“Q33. What are these documents in Plaintiff’s Exhibit 10?

“A. They are affidavits filed in the United States Patent Office showing the merger of Tattoo, Inc., with several other corporations to form Associated Distributors, Inc.

“Q34. Were any trademarks involved in this case referred to in this merger?

“A. Yes. The trademark Tabu and registration 314,493 passed by virtue of this merger from Tattoo, Inc., to Associated Distributors, Inc.

“Q35. I call you attention to a document marked for identification Plaintiff’s Exhibit 11, and ask you if you can identify the signature thereon.

“A. Yes. This is the signature of J. L. Younghusband.

“Q36. Is that the same J. L. Younghusband who is one of the partners of Consolidated Cosmetics, one of the plaintiffs in this case?

“A. Yes, the same person.

“Q37. Did any trademarks pass by virtue of that [26] assignment, Plaintiff’s Exhibit 11?

“A. Yes, quite a number of trademarks, among which are Tabu registration 314,493, the trademark Taboo, registration 343,897, and the trademark Voodoo, registration 363,746.

“Q38. From whom to whom were these trademarks and registrations assigned by this document?

“A. From Associated Distributors, Inc., an Illinois corporation, and one of the predecessors of the plaintiff in this case to James L. Younghusband.

“Q39. Is that the same James L. Younghusband who is one of the partners in Consolidated Cosmetics, one of the plaintiffs in this case?

“A. Yes, sir.

“Q40. I call you attention to Plaintiff’s Exhibit 12, and ask you if you can identify the signature thereon?

“A. Yes, I can. That is the signature of James L. Younghusband.

“Q41. Did this document pass title to any trademarks and registrations involved in this suit?

“A. Yes, it did. Passed title to quite a number of trademarks from James L. Younghusband to Associated Distributors, a partnership composed of James L. Younghusband, Howard Younghusband and Paul Rowatt, and covers many trademarks, among which are Tabu 314,493, and Taboo, [27] number 343,897, and Voodoo, number 363,746.”

Mr. Hutchinson: Excuse me, counsel. I have been able to read ahead to page 13, line 26, and I think there is no use of your reading that. That may be deemed read and the exhibits therein referred to in the deposition be deemed to have been offered under our standing understanding, to save time.

Mr. McKnight: That is from the rest of page 10, page 11, page 12, and page 13 of the deposition?

Mr. Hutchinson: Yes.

Mr. McKnight: Thank you. May I ask that the reporter copy that into the record.

The Court: Let the record so show, Mr. Reporter.

(Pursuant to the foregoing stipulation, the following portion of the deposition of John Gaumer was deemed read:)

“Q42. I call your attention to a document marked for identification Plaintiff’s Exhibit 13, and ask you if you can identify the signature thereon.

“A. Yes. This is the signature of J. L. Younghusband.

“Q43. Is that the same J. L. Younghusband who is one of the partners of Consolidated Cosmetics, one of the plaintiffs in this case? “A. Yes.

“Q44. Did that document pass title to any trademarks involved in this proceeding? [28]

“A. Yes. It passed title to a number of trademarks, among which are Tabu, registration 314,493; Taboo, registration 343,897; and Voodoo, registration 363,746.

“Q45. From whom to whom?

“A. From Associated Distributors, composed of James L. Younghusband, Howard Younghusband and Paul Rowatt to Associated Distributors, a partnership, composed of James L. Younghusband, Howard Younghusband, Paul Rowatt and Walter A. Jordan.

“Q46. I call your attention to a document marked for identification Plaintiff’s Exhibit 14, and ask you if you can identify the signature of the person signing the same?

“A. Yes. This is the signature of Paul Rowatt, who I know very well, and whose signature I know very well.

“Q47. Did that document pass title to any trademarks involved in this case?

“A. Yes. It did pass title to a number of trademarks, among which are Tabu, 314,493; Taboo, 343,897; and Voodoo, 363,746, as well as the trademark

Tabu, 407,797 and the trademark Forbidden, serial number 467,868, which was then a pending registration in the United States Patent Office.

“Q48. From whom to whom did title pass by this document?

“A. Title passed from Associated Distributors, a [29] partnership composed of James L. Younghusband, Howard Younghusband, Paul Rowatt and Walter A. Jordan, to Consolidated Cosmetics, a partnership composed of James L. Younghusband, Howard Younghusband and Paul Rowatt.

“Q49. I call your attention to a document marked for identification Plaintiff’s Exhibit 15, and ask you if you can identify the signature thereon.

“A. Yes. This is the signature of Paul Rowatt.

“Q50. Did title to any trademarks involved in this proceeding pass by that document?

“A. Yes. A number of trademarks are involved in this assignment, among which are the trademarks Tabu, registration number 314,493; Tabu, registration number 407,797; Tabu, registration number 426,323; Taboo, registration number 343,897; and Taboo, registration number 437,162.

“Q51. From whom to whom did title pass by this document?

“A. This document transferred title from Consolidated Cosmetics, a partnership composed of James L. Younghusband, Howard Younghusband and Paul Rowatt, to Consolidated Cosmetics, a partnership composed of James L. Younghusband and

Howard Younghusband, one of the plaintiffs in this case.

“Q52. I show you a document marked for identification Plaintiff’s Exhibit 16, and ask you if you can identify the signature thereon? [30]

“A. Yes, I can. It is the signature of Paul Rowatt.

“Q53. Did title to any trademark involved in this proceeding pass by that document?

“A. Yes. This is an assignment of a trademark from Consolidated Cosmetics, a partnership, composed of James L. Younghusband, Howard Young-husband and Paul Rowatt to Consolidated Cosmetics, a partnership composed of James L. Young-husband and Howard Younghusband, one of the plaintiffs in this case, and covers among other trade-marks the trademarks Voodoo, registration number 363,746, and Forbidden, registration number 408,529.

“Q54. I call your attention to a document marked for identification Plaintiff’s Exhibit 17, and ask you if you can identify the signature thereon?

“A. Yes. Again this is the signature of James L. Younghusband.

“Q55. Is that the same James L. Younghusband who is a partner of Consolidated Cosmetics, one of the plaintiffs in this case?

“A. Yes, the same person.

“Q56. Did any trademarks involved in this proceeding pass by that document?

“A. Yes. The trademark Voodoo, registration number 363,746, was assigned from Consolidated

Cosmetics, a partnership, composed of James L. Younghusband and [31] Howard Younghusband to Les Parfums de Dana, Inc., a New York corporation.”

Mr. McKnight: Beginning at the top of page 14—

The Clerk: Are you offering these into evidence here, counsel?

Mr. McKnight: I will at a later time.

Beginning at the top of page 14 of the deposition:

“Q57. Is this the same Les Parfus de Dana, Inc., that is one of the parties plaintiff in this case? “A. Yes, the same.

“Q58. Now, I ask you where you obtained Plaintiff’s Exhibits 9 to 15, inclusive, and 17?

“A. They are certified copies of the original assignments. I obtained the certified copies from the United States Patent Office.

“Q59. Where did you obtain Plaintiff’s Exhibit 16?

“A. That is an original document, the original assignment, which has been in my files, over which I have charge. I brought it from my files for this hearing.

“Q60. And were the trademarks Tabu, Taboo, Forbidden and Voodoo used on perfumes and various cosmetics by all of these holders of title of these various trademarks?

“A. Yes, continuously from the first sale under each of those trademarks.

“Q61. Where did these various businesses operate from during the last twelve years? [32]

“A. From 30 West Hubbard Street, Chicago 10, Illinois, and 430 North Michigan Avenue, previous to that time, and from 11 East Austin Avenue, as Hubbard Street was then known in Chicago. The plaintiff Les Parfums de Dana, Inc., has its main office at 16 West 60th Street, New York, New York.

“Q62. Since April of 1948 has Consolidated Cosmetics, the plaintiff in this case, used the trademarks Tabu, Taboo and Forbidden?

“A. Yes, and it also used the trademark Voodoo until it turned over the business to Les Parfums de Dana, Inc., the other plaintiff in this case.

“Q63. Where are Tabu and Voodoo perfumes and cosmetics of the plaintiffs in this case sold?

“A. In all of the principal department stores and drug stores and many beauty shops and specialty shops throughout the country.

“Q64. Can you name some of plaintiff's Tabu and Voodoo customers in San Francisco?

“Yes, I can. The following are among plaintiff's customers in San Francisco: City of Paris, The Emporium, I. Magnin, Roos Bros., Raphael-Weill, Macy's, Hale Bros., H. Liebes & Company, J. Magnin, The White House and Owl Drug Company, and many other stores. [33]

“Q65. Can you name any customers of Tabu and Voodoo perfumes and colognes in Oakland?

“A. Yes. The following are plaintiff's customers of said products in Oakland: H. C. Capwel, Sulli-

van & Furth, I. Magnin, J. Magnin, Kuhn's, and many other stores.

"Q66. Can you give the names of any of the stores in which plaintiff's Voodoo and Tabu perfumes and colognes are sold in Los Angeles?

"A. Yes. We sell to Robinson's, Bullock's, Magnin's, The Broadway, the May Company, Owl Drug, Whelan Stores, Eastern Columbia, Haggerty's, and Sax Fifth Avenue.

"Q67. Have the sales of plaintiff's Tabu and Voodoo perfumes and colognes been extensive on the West Coast?

"A. Yes, they have, and in all of the principal stores in California, Oregon and Washington.

"Q68. Are Tabu and Voodoo perfumes and colognes nationally sold by plaintiff?

"A. They are, from coast to coast, in every city in the Union and in every city in the United States.

"Q69. Have the sales of Taboo, Forbidden and Voodoo perfumes and colognes and cosmetics been extensive? "A. Yes, throughout the country.

"Q70. Can you give some idea of how extensive the [34] sale of Tabu, Forbidden and Voodoo perfumes and colognes have been to date?

"A. Yes. They amount to in excess of thirty-two million dollars in sales throughout the United States.

"Q71. What have the sales been to date on Voodoo perfumes and colognes?

"A. Approximately a quarter of a million dollars in sales.

"Q72. Can you produce representative packages

of the products sold by plaintiffs bearing the trademarks Taboo, Forbidden and Voodoo?

“A. Yes, I can.

“Mr. McKnight: I will ask the reporter to mark the Tabu cologne Plaintiff’s Exhibit 18, the Tabu cologne Plaintiff’s Exhibit 19, the Taboo deodorant Plaintiff’s Exhibit 20, the Forbidden perfume Plaintiff’s Exhibit 21, the Voodoo cologne Plaintiff’s Exhibit 22, and the Voodoo perfume Plaintiff’s Exhibit 23.

“Q73. Where did you obtain Plaintiff’s Exhibits 18 to 23, inclusive?

“A. Well, from the premises of the plaintiffs, that is, the stockroom on these perfumes.

“Q74. Are these the genuine products of the plaintiff?

“A. Yes, exactly as they are sold on the market and in the retail stores. [35]

“Q75. Have the Tabu perfumes and cosmetics of your company, Consolidated Cosmetics, and its predecessors, been extensively advertised?

“A. Yes, they have, to the extent of millions of dollars.

“Q76. In what kind of publications?

“A. In the principal elite publications of the country, such as Harper’s Bazaar, Vogue, Town and Country and the New Yorker, and in practically all of the metropolitan newspapers in the United States.

Q77. Why were these mediums chosen?

“A. Because the line is rather a high-priced line and only those people who read such magazines

are likely to be our customers, although in the smaller sizes we reach people of moderate income; the national publications add to our prestige and the metropolitan newspapers reach everyone.

“Q78. Now, will you please produce some typical Tabu advertisements of the plaintiff, Consolidated Cosmetics, and its predecessors?”

“A. Yes. Here are some typical Tabu advertisements.

“Mr. McKnight: I will ask the Reporter to mark these documents for identification as Plaintiff’s Exhibits 24 to 41, inclusive. [36]

“Q79. I show you these advertisements, Plaintiff’s Exhibits 24 to 41, and ask you where you obtained them?”

“A. From the files at my office, over which I have supervision and control. These are copies of advertisements which appeared in publications and which I have retained for reference.

“Q80. I call you attention to names and dates at either the tops or bottoms of each of these advertisements, Plaintiff’s Exhibits 24 to 41, what is the purposes of these names and dates?”

“A. They show the publications and date of publication in which the advertisements appear.

“Q81. Did you personally see the advertisements Plaintiff’s Exhibits 24 to 41 in the publications as they appeared on the market?”

“A. Yes, at that time or shortly thereafter, in every one of them.

“Q82. And these advertisements as shown by Plaintiff’s Exhibits 24 to 41, inclusive, were seen

by you in these publications at or about the date they bear? "A. That is right.

"Q83. And you personally know of your own knowledge? "A. I do. [37]

"Q84. How early do these advertisements of Tabu perfume go back to?

"A. September of 1941, when Plaintiff's Exhibit 39 appeared in *Beauty Fashion*, *Harper's Bazaar*, *Town and Country*, *Vogue* and *You*.

"Q85. Calling your attention to Plaintiff's Exhibits 24 to 41, inclusive, is the word *Forbidden* used in these advertisements in association with the trademark *Tabu*?

"A. Yes, consistently. You will notice down at the bottom of some place upon each of these advertisements the expression, 'The *Forbidden Perfume*.'

"Q86. What was the reason for the use of *Forbidden*?

"A. *Forbidden* and *Tabu* mean the same thing; they are synonyms. You might call *forbidden* a translation of *tabu*, although *tabu* has also become an English word.

"Q87. Are these advertisements, Plaintiff's Exhibits 24 to 41, all of the advertisements of *Tabu* perfume?

"A. By no means. There are hundreds and hundreds of advertisements. These are merely typical of some of the *Tabu* ads in national publications.

"Q88. Has there been any advertising of plaintiff's *Voodoo* perfume and cologne?

"A. Yes. They also have been extensively adver-

tised [38] in the magazines of metropolitan newspapers in the United States.

“Q89. Can you produce such advertising?

“A. I can. Here are a few of them.

“Mr. McKnight: I will ask the Reporter to mark these advertisements Plaintiff’s Exhibits 42 to 84, inclusive.

“Q90. I call your attention to Plaintiff’s Exhibits 42, 43 and 44 and ask you what kind of advertisements those are?

“A. These are magazine advertisements that appeared in Harper’s Bazaar, Vogue, Beauty Fashion and The New Yorker.

“Q91. Can you identify those advertisements from your own knowledge?

“A. Yes. I have seen every one of them in the magazines at the time or shortly after they appeared.

“Q92. Now, I call your attention to documents marked for identification Plaintiff’s Exhibits 45 to 48, inclusive, and ask you what kind of advertisements those are.

“A. Yes. This is material furnished by the plaintiff to its customers for the purpose of advertising Voodoo products in the metropolitan newspapers.

“Q93. Have you seen this material used in the metropolitan [39] newspapers?

“A. Yes, I have.

“Q94. Now, I want to call your attention to Plaintiff’s Exhibits 49 to 84, inclusive, have you seen this material before? “A. Yes, sir.

“Q95. What are those?

“A. These are advertisements that were run by our customers in metropolitan newspapers in the nation, using mats furnished by us or their own material and in many cases our mats have been used with slight changes to conform with policies set by the various department stores.

“Q96. Can you identify these advertisements, Plaintiff’s Exhibits 49 to 84 as advertisements referring to the Voodoo products of plaintiff?

“A. I can and I do.

“Q97. Have you seen them before?

“A. I have seen every one of them.

“Q98. Where did you get these Plaintiff’s Exhibits 49 to 84?

“A. Out of my file over which I have control. I keep copies of all of these advertisements for reference purposes.

“Q99. How did you obtain them? [40]

“A. They were sent to us by the department stores at the time they requested payment for our participation in the cost of running those advertisements, and some of them I may have obtained directly from our salesmen, who make a habit of clipping such advertisements out of newspapers and sending them to us.

“Q100. You say that the stores sent in ads to claim a credit. What kind of ads are these?

“A. These are co-operative ads, in the cost of which the store and we participate.

“Q101. And in order to collect on this, they have to give proof of the publication?

“A. That is right.

“Q102. What has been the extent of advertising of plaintiff’s products Tabu, Voodoo and Forbidden in the United States to date by the plaintiffs and their predecessors?

“A. Approximately \$2,380,000.

“Q103. Has any of this advertising been done on the West Coast, including the States of California, Oregon, and Washington?

“A. Oh, yes, quite extensively in that territory. Of course, the national publications such as Vogue, Harper’s Bazaar, Town and Country, all have wide circulation on the West Coast, including California, [41] but there have been hundreds of advertisements of plaintiff’s perfumes and colognes in metropolitan newspapers in San Francisco, Oakland, Los Angeles, and other cities. For instance, Plaintiff’s Exhibit 49 is for Voodoo perfume by the City of Paris, appearing in the San Francisco Examiner for December 21, 1950; Plaintiff’s Exhibit 50 is a Voodoo advertisement appearing in Haggerty’s store advertisement in the Los Angeles Times for December 11, 1950. Plaintiff’s Exhibit 51 and 52 are large advertisements of Plaintiff’s Voodoo perfume by Robinson’s, one of the largest stores in Los Angeles. These ads appeared in the Los Angeles Times.

“Plaintiff’s Exhibit 54 is an advertisement of Voodoo and Tabu perfume, appearing in Seattle, Washington.

“Plaintiff’s Exhibits 56 and 57 are Voodoo ads in the Portland, Oregon, newspaper.

“Other advertisements are shown in this group of exhibits throughout the United States including the West Coast.

“Q104. What is the relationship between Consolidated Cosmetics, Les Parfums de Dana, Inc., and Dana Parfums, Inc.?

“A. They are all related companies and cooperate together in the production and sale of plaintiff's [42] trademark products involved in this case.

“Q105. Can you produce any of the invoices of the early sales of Voodoo cosmetics by plaintiff and its predecessors?

“A. I can. Here they are.

“Mr. McKnight: I will ask the Reporter to mark this group of documents Plaintiff's Exhibits 85, clipped together, having 48 pages, and ask you if you can tell me where you got these from?

“A. I got these from our files.

“Q106. Were they kept in the ordinary course of business?

“A. Yes, they were. I obtained them from the files of our office. They show the sales of some of the early Voodoo cosmetics by the plaintiff and its predecessors.

“Q107. From what date do these invoices begin?

“A. From May 30, 1944.

“Q108. Were there sales of Voodoo perfumes and other cosmetics prior to that date?

“A. Oh, yes, but I do not have any of the invoices since they have been long destroyed.

Q109. Why?

“A. We do not keep our records beyond that which is required by the Department of Internal Revenue. [43] Once they have approved our tax returns and these documents are five years old or later, we destroy them immediately.

“Q110. Do you know of your own knowledge that there were sales of Tabu, Taboo, Voodoo and Forbidden perfumes and other cosmetics prior to 1944 by the predecessors of Consolidated Cosmetics, the plaintiff in this case?

“A. Yes, I do. When I became employed by the predecessors of the plaintiffs in this case, November 18, 1940, I saw a large number of invoices covering goods under trademarks involved in this case long prior to November, 1940.

Q111. Did you notice any sales of Voodoo perfume and cologne on the premises at the time that you became employed by the plaintiff's predecessors?

“A. Yes. I recall them and other products, perfume, cologne, face powder and lipsticks.

“Q112. Did you see any invoices of the sale of these Voodoo products on the premises at the time you entered the employment of the plaintiff's predecessors? “A. Yes, I did.

“Q133. Were they sent to more than one place in the United States?

“A. Yes. I recall that there had been sales [44] to Texas, California, Ohio and New York and many other places.

“Q114. Calling your attention to Plaintiff's Exhibit 85, do you know whether or not those ship-

ments of Voodoo cosmetics were made by the plaintiff's predecessors as shown in the invoices?

"A. Yes. I know they were made since all of the invoices in our files cover shipments actually made of the products covered by the invoices. This is further proved by the fact that those are the marks placed on invoices by the shipping department, indicating the date of shipment, postage paid, or transportation if it is not postage, weight and other data.

"Q115. Do you know whether there were sales of Voodoo products by the plaintiff's predecessors to retail outlets in California?

"A. Yes. I see an invoice, number 2975, covering a shipment of Voodoo nail polish to Terrell's in South Pasadena, California.

"Q116. And there are other sales to California in these invoices?

"A. Yes. I also note invoices to Roos Brothers, San Francisco, California.

"Q117. Have you ever heard of Rolley, Inc.?

"A. Yes, I have. [45]

"Q118. That is the defendant in this case?

"A. Yes.

"Q119. What was your first knowledge of this concern?

"A. I was informed that this concern was using the trademarks Voodoo and Forbidden Flame in the offering for sale and selling of its perfumes and colognes.

"Q120. Is the defendant Rolley, Inc., a customer of the plaintiff?

"A. No.

“Q121. Has the plaintiff ever sold any of its Tabu or Voodoo or any perfume or cologne to defendant?

“A. Never. I looked into the record and could not find a single sale to that concern, nor any record of that concern.

“Q122. Have the plaintiffs ever given the defendant, Rolley, Inc., consent to use the trademarks Tabu, Taboo and Forbidden in any way?

“A. In no way.

“Q123. I show you Plaintiff’s Exhibit 1 and ask if you have ever seen that before?

“A. Yes, I have.

“Q124. Calling your attention to Forbidden Flame and the word Rolley Reproductions, do you see that on Plaintiff’s Exhibit 1?

“A. Yes, I see it. [46]

“Q125. What is Forbidden Flame a reproduction of?

“A. Naturally, Tabu, the forbidden perfume.

“Q126. Calling your attention to the date, October 12, 1944, on Plaintiff’s Exhibit 1, were Tabu, Taboo, Forbidden and Voodoo cosmetics on the market at that time? “A. They were.

“Q127. Do you recognize any other names on the list as belonging to other concerns than Rolley?

“A. Yes. I recognize them as belonging to concerns other than Rolley. I recognize Mandalay as the registered trademark of Palmer’s, Limited; Ballet as the registered trademark of Hudnut; Wicked as the registered trademark of Peggy Sage; Curtain Call as the registered trademark of Marie

Richieleu; Forbidden Flame as an obvious use of plaintiff's Tabu and Forbidden; White Christmas as an obvious copy of Caron's Christmas Night and Claire De Lune as the registered trademark of Colgate.

"Q128. Can you identify Plaintiff's Exhibits 86 to 89, inclusive?

"A. Yes. They are from Rolley, Inc., the defendant in this case. Plaintiff's Exhibit 86 is the perfume of Rolley, Inc., bearing plaintiff's trademark Voodoo; Plaintiff's Exhibit 87 is cologne by Rolley, [47] bearing plaintiff's trademark Voodoo; Plaintiff's Exhibit 88 is the sales slip of Plaintiff's Exhibits 86 and 87, and Plaintiff's Exhibit 89 is the bag in which these items were packed and which came from the defendant, Rolley, Inc.

"Q129. Are Plaintiff's Exhibits 86 to 89, inclusive, products of plaintiff or those of plaintiff's predecessors? "A. No.

"Q130. Have you ever seen any of defendant's Voodoo products on the market outside of their store in San Francisco?

"A. I have never seen them any place despite the fact that I have made an extensive search for them in Chicago and New York and have had search made for them in other cities outside of their store in San Francisco.

"Q131. What are the retail prices of plaintiff's Tabu perfume and cologne?

"A. Plaintiff's 1 dram Tabu perfume retails at \$2.50; the ounce of Tabu perfume retails at \$17.50.

The retail price of the two ounce Tabu cologne is \$2.

“Q132. What are the retail prices of plaintiff’s Voodoo perfume and cologne? [48]

“A. One ounce Voodoo perfume retails for \$40; the colognes, \$8.50 and \$5.

“Q133. Does the plaintiff own a state registration of the trademark Tabu in California?

“A. Yes. Tabu is registered in every State in the Union, including California; the registration of Tabu in California is number 27543.

“Q134. Do plaintiff’s own a state registration of Forbidden in California?

“A. Yes. Forbidden is registered in every state in the Union and plaintiff’s registration of Forbidden in California is number 30388.

“Q135. Do plaintiff’s own a state registration of Voodoo?

“A. Yes. The registration in California is number 32733.

“Q136. Which plaintiff owns these state registrations?

“A. The Tabu and Forbidden registrations are owned by Consolidated Cosmetics. The Voodoo registration was originally obtained by Consolidated Cosmetics and was assigned to Les Parfums de Dana, Inc., the other plaintiff in this case, which is now the owner thereof.

“Q137. Would you say that the words Tabu, Taboo and Forbidden have become associated with the products of Consolidated Cosmetics in the minds of the purchasing [49] public? “A. Yes.

Q138. Would you say that the trademark Voodoo has become associated with products of Plaintiffs in the minds of the purchasing public?

“A. Yes, because of the extensive advertising and widespread sale, these trademarks have come to indicate exclusively plaintiff’s products.

“Q139. Would the use of Forbidden Flame cause confusion?

“A. Yes, it certainly would cause confusion. Old purchasers or new prospective purchasers, having seen plaintiff’s Tabu and Forbidden, would think that Forbidden Flame was also one of plaintiff’s products.

“Q140. Would the use of Voodoo by anyone other than the plaintiffs cause confusion?

“A. Yes, because of the widespread advertising and sale of plaintiff’s Voodoo, anyone seeing defendant’s Voodoo would think it was plaintiff’s products.

“Q141. Would the use of Forbidden Flame and Voodoo cause damage to the plaintiffs?

“A. Yes, because persons who bought defendant’s Voodoo or Forbidden Flame would deprive plaintiffs of sales of the genuine Tabu and Voodoo and thus cause them loss; furthermore, a customer buying defendant’s [50] inferior Voodoo products would be disappointed in them and would not purchase in the future plaintiff’s genuine Tabu or Voodoo products.

“Q142. Have there been any previous instances where infringers have used Forbidden in infringe-

ment of plaintiff's trademarks Tabu and Forbidden?

"A. Yes, there have been several instances.

"Q143. Have you copies of any of the judgments in any of these cases?

"A. Yes, I have and I will produce them.

"Mr. McKnight: Mr. Reporter will you mark these for identification Plaintiff's Exhibits 90, 91, 92 and 93?

"Q144. Can you identify these documents?

"A. Yes, Plaintiff's Exhibit 90 is a certified copy of the decision of the United States Patent Office, holding that "Forbidden Secret" of the Lander Company was confusingly similar to Forbidden, Tabu and the Forbidden perfume of plaintiff's predecessor, and denied registration of Forbidden Secret to the Lander Company.

"Plaintiff's Exhibit 91 is a certified copy of the decision of the United States District Court in Chicago, restraining Paul Dellecamp from using Forbidden Hour as confusingly similar to plaintiff's predecessor's use of Tabu and Forbidden. [51]

"Plaintiff's Exhibit 92 is a certified copy of a judgment in the Chicago Federal Court restraining the defendant from using Forbidden as an infringement of plaintiff's Tabu or Forbidden.

"Plaintiff's Exhibit 93 is a certified copy of a decision in the Chicago Federal Court restraining the defendant from the use of Forbidden in an infringement of plaintiff's Tabu and Forbidden.

"Q145. When were these decisions?

"A. The Lander decision, Plaintiff's Exhibit 90, was on August 1, 1944; the Dellecamp decision,

Plaintiff's Exhibit 91, was on April 19, 1946; the Max decision, Plaintiff's Exhibit 92, was on February 5, 1948, and the Hoffheimer decision, Plaintiff's Exhibit 93, was on October 25, 1948.

"Q146. Do you know whether or not Thrifty Drug is a customer of plaintiffs and sells Voodoo in San Francisco and Los Angeles?

"A. Yes, I do. That is shown by some of the invoices in Plaintiff's Exhibit 85. Thrifty Drug is sometimes referred to as Borun Brothers.

"Q147. Does Mr. James L. Younghusband hold any position with Dana Perfumes?

"A. Yes. The same Mr. James L. Younghusband, who is a partner with Consolidated Cosmetics, is also President of Dana Perfumes. [52]

"Q148. Have there been any previous instances where others have used Voodoo and have been restrained by court order from using this trademark?

"A. Yes. These are three documents, one of which is by court order and the other two are by agreement.

"Mr. McKnight: Let the Reporter mark these documents as Plaintiff's Exhibits 94, 95 and 96 for identification.

(Documents so marked.)

"Q149. Can you identify Plaintiff's Exhibit 94?

"A. Yes. Plaintiff's Exhibit 94 is a certified copy of a judgment of the United States District Court for the Southern District of New York, restraining Eterne Manufacturing Corp. and Para-

gon Distributing Corp. from using Voodoo Brown as an infringement of Plaintiff's trademark Voodoo.

"Q150. Who was the plaintiff in this New York suit?

"A. Consolidated Cosmetics, the plaintiff in this case.

"Q151. Can you identify the signature of the person who signed for Consolidated Cosmetics in Plaintiff's Exhibit 95?

"A. Yes. That is the signature of our counsel, James R. McKnight. [53]

"Q152. Do you know about this settlement agreement in Plaintiff's Exhibit 95?

"A. Yes, I do. The G. W. Keeton Company of Elmire, New York, had been using Voodoo on Perfume. They agreed to respect our registration of Voodoo and to discontinue the further sale of Voodoo perfume.

"Q153. Can you identify any signature on Plaintiff's Exhibit 96?

"A. Yes, I can. I know that is the signature of Howard Younghusband.

"Q154. Are you familiar with the facts concerning the settlement as shown by Plaintiff's Exhibit 96?

"A. Yes. That was another case, where Columbia Laboratories of Columbia, South Carolina, had been selling Voodoo perfume and agreed to respect Consolidated Cosmetics registration of Voodoo and to discontinue any further sale of Voodoo perfume.

"Q155. Do you know of any other instance where

Rolley, Inc., the defendant in this case, has used the trademark of another company?

“A. Yes. Rolley was denied registration because it was confusingly similar to the trademark Ralley of Coty, Inc.

“Q156. Have you any documents to support that statement?

“A. Yes, Here is the original copy of the [54] decision of the Patent Office holding Rolley confusingly similar to Ralley.

“Mr. McKnight: Will the Reporter please mark this original copy of the decision as Plaintiff’s Exhibit 97?

(Document so marked.)

“Q157. Now, Mr. Guamer, a little earlier you said that there were state registrations of Tabu, Forbidden and Voodoo in the State of California, owned by the plaintiffs? “A. Yes, I did.

“Q158. Can you produce the originals of these documents?

“A. Yes, I can. Here they are.

“Mr. McKnight: Will the Reporter mark these documents Plaintiff’s Exhibits 98, 99 and 100 for identification?

(Documents so marked.)

“Q159. Can you identify Plaintiff’s Exhibit 98?

“A. Yes. That is the original certificate of registration of the trademark Tabu, issued to Consolidated Cosmetics, a partnership, consisting of James L. Younghusband, Howard Younghusband

and Paul Rowatt, and an assignment to the present Consolidated Cosmetics, consisting of James L. Younghusband and [55] Howard Younghusband, the plaintiffs in this case.

“Q160. What is Plaintiff’s Exhibit 99?

“A. That is the certificate of registration of the trademark Voodoo, issued to Consolidated Cosmetics, the plaintiff in this case, and later assigned to Les Parfums de Dana, Inc., the other plaintiff in this case.

“Q161. What is Plaintiff’s Exhibit 100?

“A. That is the registration of the trademark Forbidden, originally issued to Consolidated Cosmetics, a predecessor of the plaintiff, and assigned to Consolidated Cosmetics, which is one of the plaintiffs in this case. [56]

Mr. McKnight: I now offer in evidence Exhibits 1 to 100.

The Court: They may be admitted and marked next in order.

Mr. Hutchinson: Subject to the running objection?

The Court: Yes.

Mr. Hutchinson: The deposition as such has not been offered, your Honor. I assume it will be now. Otherwise, I would like to comment.

Mr. McKnight: I will offer this deposition also in evidence, together with Exhibits 2 to 100, inclusive.

The Court: Let them be admitted and marked.

The Clerk: Plaintiff’s Exhibits 2 to 100, inclusive, admitted and filed in evidence.

(Plaintiff's Exhibits 2 to 100, inclusive, were thereupon received in evidence.)

Mr. Hutchinson: To the offer of the deposition and to the exhibits as incorporated therein, we wish to object to certain parts in addition to the other objections we have now pending.

First, we would like to object to the receipt of any information where evidence or opinion of the witness with respect to Tabu and its variants, and to Forbidden, for the reasons I outlined earlier, namely, it isn't an issue; that those names, Tabu, particularly, and variants, have never [57] been used; Forbidden has never been used, and the use of Forbidden Flame is so far back that the statute of limitations and laches would bar it anyway. No claim is made to it, and therefore **I think that** it is very well taken objection.

The opinion of the witness appearing at page 2 and following on the subject of ownership of the trademark Voodoo, our objection to that is that the statement or opinion, if it be received at all, be limited to the registration and not to imply there is any common law or use right. We have no objection to it being received as to ownership of the certificates outlined there.

With regard to the opinion of this witness that the names of these various perfumes as used by specific parties, Forbidden Flame, and so on, I think should be refused with regard to our main objection. If not, then we make further objection that he is not qualified, nor is any attempt to qualify

him made, that he is in a position to give informed opinion.

And also object to the receipt of judgments as between other persons and agreements as between other persons, they couldn't possibly have any bearing, being matters between another party, couldn't possibly be admissions or proof here, and do not relate to an earlier time.

Also wish to object to the portion of the deposition, [58] page 28 and following, with reference to the claimed imitation of perfumes and using of imitative names by the plaintiff, that being obviously a conclusion of the witness, and also being without foundation.

That is our objection, your Honor.

Mr. McKnight: No further comment.

The Court: I will allow the testimony to go in subject to motion to strike and over your objection.

Mr. Hutchinson: I am sorry, I didn't understand. We do not press for ruling now because I think it is only for such matters to be considered at the close of the case, and we stipulate that may be the case.

Mr. McKnight: Your Honor, I want to read the discovery deposition of Charles A. Rolley, who is President of Rolley, Inc., the defendant in this case. I am reading this deposition for the purpose of the admissions contained therein.

Mr. Hutchinson: Counsel, what are you offering? We object to the reading of this deposition, certainly, at this time. There was a request for

admissions and it has been answered and that is on file. That was subsequent to this deposition. Pleadings were here. This is the plaintiff's case now. The witness gave this deposition to be available only in the cross complainant's case. He will testify. I think it inappropriate to have the deposition read and then the testimony by the witness. [59]

The Court: His offer is limited now, limited to the admissions.

Mr. Hutchinson: Well, the whole deposition certainly needn't be read in that case. The admissions, I assume. The request for admissions was filed this Fall, in the last 60 days or so, and answer filed. Certainly they should make their own case on their own testimony. If they want to know whether there are omissions perhaps we can stipulate and save a lot of reading.

Mr. McKnight: I think we will have to read portions of this. I will leave out whatever portions I can that are unimportant, unless counsel wants to read them.

The Court: Very well, I will allow it. Objection overruled.

Mr. McKnight: (Reading)

“Examination by Mr. McKnight:

“Q. Will you please state your name?

“A. Charles A. Rolley.

“Q. And your address?

“A. Do you want my business address or home address?

“Q. Both.

“A. My business address is 182 Geary Street and my home address is 410 Elder Avenue, Millbrae, California.

“Q. What is your age? “A. 47. [60]

“Q. What is your occupation?

“A. Manufacturer of perfumes and cosmetics.

“Q. Do you have any connection with Rolley, Inc.?

“A. Yes.

“Q. The defendant in this case?

“A. Yes.

“Q. What is your connection?

“A. President.

“Q. What is Rolley, Inc., a California corporation?

“A. Yes, it is.

“Q. Are you a stockholder——”

The Court: What page?

Mr. McKnight: I am skipping to page 5 at line 9.

“Q. Are you a stockholder of Rolley, Inc.?

“A. Yes, I am.

“Q. Do you own most of the stock of Rolley, Inc.?

“A. Yes, I do.

“Q. How large a percentage of the stock of Rolley, Inc., do you own?

“A. I own 5000 shares out of 8250 shares.

“Q. Are you the executive in charge of the operation of Rolley, Inc.?

“A. Yes, I am.

“Q. Do you take orders from anyone else?

“A. I don't take orders. We have board of directors [61] meetings, of course. On certain things I would have to have permission from the board of directors.

“Q. But between board of directors meetings you are the executive in charge of running the company? “A. That’s right.

“Q. What is the business of Rolley, Inc.?

“A. You mean what kind of business?

“Q. Yes.

“A. The manufacture and sale of perfumes and cosmetics.

“Q. Where is the business located?

“A. Our plant and office is at 718 Mission Street. We have a retail store and my personal office at 182 Geary Street—both in San Francisco.

“Q. And what kind of business is conducted at the retail store on Geary Street in San Francisco?

“A. The sale of perfumes, cosmetics, and to some extent sundry gift items.

“Q. And are practically all of the products of Rolley, Inc., sold retail from its store at 182 Geary Street, San Francisco?

“A. No. We do a wholesale business too, but they go from 718 Mission.

“Q. What percentage of the business of Rolley, Inc., is conducted at 182 Geary Street?

“A. At the present time I’d say approximately 50%. [62]

“Q. Do you sell any perfume wholesale?

“A. Oh, yes.

“Q. Would you say 50% of the business—

“A. Is wholesale.

“Q. —is wholesale business? “A. Yes.

“Q. I had understood that those wholesale activ-

ities at Rolley, Inc., had practically ceased. Is that true? “A. No, that is not true.

“Q. How many employees are there at the manufacturing plant of Rolley, Inc.?

“A. That varies according to the time of the year.

“Q. Well, approximately how many on the average?

“A. Well, at some times it will run around five to six, and it drops down as low as three.

“Q. How many employees are there in your store at 182 Geary Street?

“A. Just a moment—let me see—one, two, three—in addition to myself there are two regular and occasionally an extra.

“Q. Is the business of Rolley, Inc., operating now at a profit or a loss?

“A. Well, actually at a loss.

“Q. And how long has it been operating at a loss? “A. The last two years.

“Q. What trade-marks does Rolley, Inc., use on its perfumes? [63]

“A. I don't know what you mean by the trade-mark. Do you mean a registered trademark?

“Q. Well, how do you mark your perfumes at Rolley, Inc.?

“A. Rolley Perfume, well, they are labeled with the word ‘Rolley,’ and then they are labeled with the distinct fragrance of each particular fragrance. There are several of them.

“Q. You have more than one fragrance?

“A. We have several of them.

“Q. And a different name is given to each fragrance?
“A. That’s right.

“Q. Can you tell me approximately how many different names you use?

“A. At the present time around twenty-five.

“Q. Have you ever used the trade-mark Forbidden Flame on or in connection with any of your perfumes or colognes?

“A. Not since we were incorporated.

“Q. Prior to that time did you use the trade-mark Forbidden Flame on perfumes or colognes?

“A. We used—I did, rather, as an individual owner, use it prior—or I will say not later than 1943.

“Q. And as early as when?

“A. Oh, I would go back to 1939 or ’40 on it.

“Q. So that you personally used the trade-mark Forbidden Flame on or in connection with perfumes or colognes from [64] 1938 or ’39 to approximately 1943?
“A. 1943.

“Q. And then you discontinued using the trade-mark Forbidden Flame?
“A. Yes.

“Q. And you have not used it since that time?

“A. No.

“Q. And Rolley, Inc., has never used the trade-mark Forbidden Flame?
“A. No.

“Q. On what products did you use the trade-mark Forbidden Flame?

“A. Perfume and cologne.

“Q. Why did you stop using the trade-mark Forbidden Flame?

“A. Because it was a poor seller.

“Q. Approximately how much in dollar volume did you sell of products bearing the trade-mark Forbidden Flame?

“A. I wouldn’t know, because that is so far back I would not have the slightest idea.

“Q. Several thousand dollars?

“A. Oh, no. If it was that much I would have kept it. Nothing like that, no.

“Q. Do you claim that the corporation Rolley, Inc. the defendant in this case, is a successor to you personally [65] in the perfume business?

“A. Yes, it is.

“Q. Did you make any trade-mark search before adopting the trade-mark Forbidden Flame?

“A. Not what you would call a search. I checked on advertising and in different stores, and so forth, and I haven’t been able to find anything like that; I could find no record of it at all.

“Q. Did you make any trade-mark search with a lawyer to determine whether there were any prior registrations of the trade-mark Forbidden Flame? “A. No.

“Q. Did you know that the trade-mark Forbidden Flame belonged to the plaintiff in this case, Consolidated Cosmetics at that time?

“A. I did not. I don’t even know it now.

“Q. Have you ever heard of the trade-mark Tabu? “A. Yes, I have.

“Q. When did you first hear of the trade-mark Tabu?”

Mr. McKnight: The witness, when he gave his discovery deposition answered as follows: “Oh, be-

fore I went in the perfume business.” Then when he signed his deposition, he changed it to: “After I went in the perfume business. I would say around at least 1937 or even prior to that, when they used to be sold only in Mexico, to my knowledge. [66]

“Q. Was that before you used Forbidden Flame on your perfume?

“A. The knowledge of Tabu?

“Q. Yes. “A. Oh, yes.

“Q. Do not ‘Forbidden’ and ‘Tabu’ mean the same thing? “A. No, not to me.”

Mr. McKnight: Skipping to page 12, Mr. Hutchinson, line 3.

Mr. Hutchinson: May I suggest you read line 20 to explain the meaning given by the witness?

Mr. McKnight: **All right.**

Mr. Hutchinson: Line 20, on page 10.

Mr. McKnight: (reading)

“Q. Do not ‘Forbidden’ and ‘Tabu’ mean the same thing? “A. No, not to me.

“Q. Well, will you tell us how they differ?

“A. Well, I term ‘Tabu’ almost as a foreign word, or an American slang word. I mean that is my interpretation of it. I don’t know what it is.

“Q. Does ‘Tabu’ mean ‘Forbidden’?

“A. I don’t know.

“Q. Have you ever looked it up in the dictionary?

“A. I have a long time ago, but I don’t know what it means.” [67]

Mr. McKnight: Do you want me to read on from there?

Mr. Hutchinson: I think the next two questions.

Mr. McKnight: (reading)

“Q. Well, can you give me any difference between the words in meaning? If you can, I would appreciate it.

“A. Well, what is the connection between the subject in hand and Forbidden Flame? I can't see it.

“Q. Well, suppose you answer my questions, Mr. Rolley? How does the word 'Forbidden' differ from the word 'Tabu'?

“A. Well, they just don't mean the same to me—that's all.”

Mr. Hutchinson: I think that is all.

Mr. McKnight: We will begin at line 3, page 12:

“Q. Have you seen the word 'Forbidden' used in connection with the advertising of Tabu perfume?

“A. Recently I have seen it in the magazines, 'The forbidden perfume.'

“Q. How long have you seen advertising of Tabu, 'The forbidden perfume'?

“A. I don't recall.

“Q. Many years?

“A. Quite a long time.

“Q. How many years would you say?

“A. I really would not recall.

“Q. Would you say as early as 1937? [68]

“A. I don't really know when.”

Mr. McKnight: That is what he said when he signed it. When he gave the deposition he said, “No, because I would not have taken interest in

it then; that was before I was in the perfume business." He is referring to 1937. The question was:

"Q. Would you say as early as 1937? No, I would not have taken interest in it then; that was before I was in the perfume business." When the deposition was signed, that was stricken out by the subscriber, Mr. Rolley, and he wrote in, "I don't really know when."

Mr. Hutchinson: If the Court please, I am not familiar with making an argument about changes a witness makes in the deposition. That is the purpose of having him read and sign it, and I don't believe we should have interpolated all these comments. It should be read as is. I think counsel's remarks about——

The Court: The objection is to your argument at this time.

Mr. McKnight: It isn't argument. I am not commenting on the value of what he did. I am merely telling your Honor what he said when we took the deposition, which I think is a very important question because the man at that time spoke spontaneously. Then after he had——

The Court: Consulted his attorney?

Mr. McKnight: I don't know. I presume he did. But all I [69] want to get in the record is what he said at the time he gave the deposition, without comment, and that was what he said when he signed it.

‡ The Court: Very well, proceed.

‡ Mr. McKnight: (continuing reading) "When did you first get interested in the perfume business?"

When the deposition was taken he said, "The early part of '38." When he signed the deposition he said, "The early part of 1933."

"Q. And didn't you notice it then?

"A. Not necessarily, no, because to me I would never interpret it as the name of a perfume. To me the name of the perfume, was, is, and always has been Tabu. It has never been labeled as 'Forbidden.' I have never seen a bottle of Tabu with the word 'Forbidden' on it; I have never known of a bottle with the label 'Forbidden' on it. It has never been sold, as far as I know, to the public or to the trade, with the word 'Forbidden' on it or connected with the word 'Forbidden' whatsoever. It would merely be using the word 'Forbidden' as an adjective. If I advertise a perfume and say it is a thrilling perfume, I don't see how anyone could say that the perfume name was Thrilling, when it is only a description of it; and to my knowledge before that time if I was to assume that an adjective used in perfume advertising was forbidden by other people to use, then I would have a complete misconception [70] of it.

"Q. What kind of fragrance did Forbidden Flame have?

"A. It was a heavy rooty, I would call it; you know, like roots, concocted in the ground.

"Q. Was it an oriental fragrance?

"A. Yes, I would term it that.

"Q. Somewhat similar to the smell or fragrance called Tabu?

"A. No, nothing like it at all."

The Court: We will have to have a demonstration on that.

Mr. McKnight: That is a matter that is up to your Honor. The exhibits are here.

Mr. McKnight: (continuing) "You wouldn't say that Tabu is an oriental fragrance then?"

"A. Oh, yes, but there are different oriental types of fragrance, and there could be a great variation between all of them; but no person with the slightest knowledge of perfume or an individual buying perfume, any woman buying perfume, that would ever possibly say there was any relationship as far as fragrance is concerned.

"Q. Do you ever choose trade-marks for your perfumes or cosmetics which are similar to the trade-marks of other local concerns?"

"A. I never have to my knowledge.

"Q. Have you ever used the trade-mark Claire de Lune on [71] perfumes or cosmetics?"

"A. I used the name many years ago when I was individual owner of the business.

"Q. Do you know that this trade-mark Claire de Lune was at that time the property of the Colgate Company?"

"A. Not of the Colgate Company. It was some other firm before Colgate bought them out, and the very day that I was notified or heard about it I discontinued using the name.

"Q. So you are not using the trade-mark Claire de Lune at the present time?"

"A. I haven't used it for many years.

"Q. Did you ever use the trade-mark White

Christmas on perfume? "A. Yes.

"Q. Wasn't this perfume a copy of Christmas Night perfume?

"A. Well, that would be a matter of opinion whether it would be a copy of it or not.

"Q. Did you know that Christmas Night perfume was a famous perfume and on the market at that time?

"A. I believe there was a perfume called by a French name that meant Christmas Night. It was called *Nuit Noel*. It meant Christmas Night.

"Q. That was a perfume of Caron?

"A. That's right. [72]

"Q. Can you tell how the Christmas Night perfume smells? "A. No, sir.

"Q. Why did you discontinue the use of that trade-mark?

"A. Because it wasn't a good seller.

"Q. Have you ever used the trade-mark *Forever* on perfumes? "A. No, I do not.

"Q. Are you still using *Serenade*?

"A. No.

"Q. Are you still using *Serenade*?

"A. No.

"Q. Why did you discontinue it?

"A. The same reason.

"Q. Have you ever used the trade-mark *Ballet* on perfume? "A. Yes.

"Q. Do you know that that is a registered trade-mark of Richard Hudnut of New York on perfume? "A. No, I don't.

"Q. Are you still using the trade-mark *Ballet*?

"A. Yes.

“Q. Have you ever made any search for these trade-marks before using them?

“A. You mean legal search?

“Q. Yes. “A. No.

“Q. Why don't you do that? [73]

“A. Well, when I first started in I wasn't aware of that, and I could not afford it.

“Q. Is it your policy to take a trade-mark of a well-known perfume and use the mark or a similar mark on your products?

“A. No, it is not, because the moment it is called to my attention and they can show prior use of it I will immediately discontinue it, and have in the past.

“Q. Do you own the trade-mark Rolley?

“A. Well, that's my own name.

“Q. Do you own the trade-mark registration of Rolley?

“A. The original registration of it?

“Q. Wasn't it registered at one time?

“A. No.

“Q. Did you not have a report numbered 415-153, on the trade-mark Rolley for perfumes?

“A. They declined it, to my knowledge.

“Q. Did you not at one time have litigation with Coty, Inc., in which Coty was successful in cancelling your registration of the trade-mark Rolley on the ground that it was confusingly similar to Coty's prior registration of the trade-mark Rally? “A. Rallet?

“Q. R-a-l-l-y—Rally for perfumes?

“A. They may have been successful in the reg-

istration, but [74] they have never been successful in preventing me from using my own name, which I was using and have always used and will continue to use.

“Q. Have they ever filed suit against you on it?

“A. They haven’t.

“Q. But they were successful in having your registration of Rolleys cancelled, weren’t they?

“A. That is right.

“Q. So that you did have a registration of Rolleys at one time?

“A. I don’t know whether I actually had it or it was in for application and never went through. I don’t remember.

“Q. Is that the only trade-mark that you ever attempted to register in the Patent Office?

“A. No.

“Q. What other trade-mark have you attempted to register?

“A. Response, Decollete, Frantic, and there may be one or two others that I don’t remember. I will have to look up the records.

“Q. And you are owners of these registrations at this time? “A. Yes.

“Q. You or the company?

“A. Well, the company is now, because it was taken over by the company.

“Q. Are you familiar with the fact that trade-marks are [75] registerable in the United States Patent Office? “A. I am now.

“Q. How long have you known that?

“A. Oh, I don’t know the exact time.

“Q. Well, you certainly have known it for several years, haven't you? “A. Yes.

“Q. When would you say you first knew a trade-mark can be registered in the United States Patent Office?

“A. Well, I wouldn't want to say. I don't know. I can't tell you when I first learn something.

“Q. In one of your early lists of perfumes did you refer to certain perfumes as Rolley Reproductions? “A. Yes.

“Q. What did you mean by the expression Rolley Reproductions?

“A. My interpretation of certain fragrances, certain odors, or whatever you want to call it.

“Q. Would you say that these perfumes of yours were intended as copies of other well-known perfumes? “A. Yes.

“Q. And were the trade-marks used on the Rolley perfumes to indicate which well-known perfumes were copied? “A. Only used numbers.

“Q. Well, I show you a list, which I would like to have the [76] reporter mark for identification Plaintiff's Exhibit 1, and ask you if that is your list? “A. Yes, it is.

“Q. Do you see the trade-mark Forbidden Flame down there? “A. Yes.

“Q. What was Forbidden Flame a reproduction of? Tabu? “A. No.

“Q. Well, what was it a reproduction of?

“A. I don't recall, but I do know it wasn't Tabu.

“Q. How do you know that?

“A. Well—

“Q. If you don't know what perfume it was, how do you know which perfume it was not? Because it might involve you in unfair competition?

“A. No, I just discontinued it. It is so long ago.

“Q. Will you let me see that list, please? That list came out approximately at what date?

“A. Either 1943 or prior to that date.

“Q. And you used it from 1943 on until—

“A. No, no.

“Q. When did you use it?

“A. Prior to '43.

“Q. Oh, prior to '43? “A. Yes.

“Q. Approximately when was it in use?

“A. Oh, I would say from—you mean these particular [77] perfumes?

“Q. No, that list.

“A. That list—it was in use from around approximately 1940 up until about 1943.

“Q. And was that distributed to customers and prospective customers?

“A. It was kept in our store, in our shop, for them to look at.

“Q. Now, when did you first use the trade-mark Voodoo on or in connection with perfumes or colognes?”

Mr. McKnight: He first answered when he gave the deposition, “Some time in 1938.” When he signed the deposition, he wrote, “Some time in 1935 and possibly 1934.

“Q. About what date?

“A. I don’t recall the exact date now. It was some time in the summer of—” He originally testified, “1938,” and when he signed the deposition he inserted, “1934 or 1935.”

Mr. Hutchinson: Excuse me, mine looks like 1935.

Mr. McKnight: 1934 or 1935. In the original, it was “1938.”

Mr. Hutchinson: All right.

Mr. McKnight: (continuing reading)

“Q. Didn’t you earlier state that your first use of Voodoo was some time on or about August 15, 1940? “A. That’s right. [78]

“Q. Why do you change your testimony now on that?

“A. Because when I first called attention of Dana to their use of the word Voodoo, which I had been using for years, they asked me for some proof of prior use, and I only gave them what I thought was necessary at the time and it took—well, it took a little work and effort and everything to trace back and get the information, so I was never sure of myself and I gave them what I was not entirely positive of at that time.”

Mr. McKnight: When he signed the deposition, he left off the last few lines and said he turned over what was handy at that time.

Mr. McKnight: (continuing reading)

“Q. You didn’t furnish the Dana people with any information on selling Voodoo in 1938, did you?

“A. No, I didn’t.

“Q. And did you know at that time what date

their trade-mark had—their registration of Voodoo?

“A. You mean when I furnished them with the information?”

“Q. Yes.

“A. They wrote me a letter and told me that they had reported—they wrote me, and then I gave them by information.

“Q. And when did you first go into the perfume business?”

Mr. McKnight: The answer originally was, “The early part [79] of 1938.” When he signed the deposition he wrote, “The early part of 1933.

Mr. McKnight: (continuing reading)

“Q. And you started with the trade-mark Voodoo? Is that right?”

“A. Well, within a matter of a few months.

“Q. Is that the time when you were making reproductions of other well-known perfumes?”

“A. That’s right.

“Q. What was Voodoo a reproduction of?”

“A. It was an original of my own.

“Q. And to whom did you sell Voodoo perfume in 1948?”

“A. To my own retail customers.

“Q. Can you give me the names of any of them today?”

“A. Well, I wouldn’t have a record of retail customers that many years ago. I have in mind right now—I know of one person now living in Sacramento. I know she has been remarried a couple of times. I would have to trace her down. And

another one I know very well. She used to buy a lot from me. She passed away here about two or three years ago.

“Q. What is the name of this party in Sacramento that bought some Voodoo perfume from you in 1938?”

“A. I would have to check my records and look it up.

“Q. You don’t have any personal knowledge of it now?” “A. Of her name now? [80]

“Q. Yes.

“A. No, because she has been remarried since then and I don’t know what it is now.

“Q. You don’t know her maiden name?”

“A. I know it, but I can’t recall it. That was a long time ago.

“Q. And she was an individual customer?”

“A. Yes, she was an individual retail customer.

“Q. She didn’t resell the perfume?”

“A. No.

“Q. She purchased it from you——

“A. Yes, that’s right.

“Q. ——and used it on herself?”

“A. Yes.

“Q. And then you have another person, who has since died, that you sold Voodoo to in 1938? Is that correct?”

“A. That I recall definitely on that perfume.

“Q. What was the name of the person that died?”

“A. Mrs. Eleanor Coffee. That is spelled just like regular coffee.”

The Court: I think it is time to go and get some coffee ourselves.

(Thereupon a recess was taken until the hour of two o'clock p.m.) [81]

Afternoon Session—2:00 o'clock p.m.

Mr. McKnight: Continuing this discovery deposition, your Honor:

“A. Mrs. Eleanor Coffee. That is spelled just like regular coffee.

“Q. And where did she live?

“A. On Sutter Street. I can't think of the hotel. It's right above Mason on Sutter Street.

I would know the name of the hotel if it was mentioned, but I can't think of it.

“Mr. Brown: Cartwright?

“A. No, that is up a block. It is right next to the Marines Memorial Building now.

“Mr. Brown: On the Beresford?

“A. No, that isn't it.

“Mr. McKnight: Q. And was that person a retail purchaser who used the perfume herself?

“A. Yes. She bought that and other perfumes too.

“Q. Do you have any other persons that you can tell use about who purchased Voodoo products from you in 1938?

“A. No, it would be impossible to remember at this time who the retail purchasers were that far back.”

Mr. McKnight: That is the way the witness tes-

tified originally. When the deposition was signed the words "at [82] that time" were added.

Mr. Hutchinson: Excuse me, "at this time."

Mr. McKnight: "At this time."

(Continuing reading) "Q. They were your first customers, weren't they?"

"A. No, not my first, but it just happened that one bought a great amount of stuff from me so naturally I have a vivid recollection of her.

"Q. And the other one bought——

"A. And the other brought several other people to me later on, and I got to know her quite well. That is how I happened to remember them. Otherwise I would not be able to remember them.

"Q. What time in the year 1938?

"A. I don't remember the exact date now.

"Q. When did you go into business in the year 1938?

"A. In the early part of possibly '38 I started."

Mr. McKnight: That is the way the witness testified originally, but when he signed the deposition he changed it to, "In the early part of 1933 I started."

(Continuing): "What month?"

"A. That I don't remember.

"Q. Was it in March?

"A. No, I think—it could have been March, but I would say February would be closer. [83]

"Q. And where were you located at that time?

"A. 240 Stockton Street." Then he changed that when he signed the deposition, "212 Stockton Street."

Mr. McKnight: (continuing reading) San Francisco? "A. San Francisco.

"Q. Now, at the time that you adopted this trade-mark Voodoo you made no trade-mark search through an attorney? "A. No.

"Q. And all you did was to run around to some of the stores and see if it was on sale?

"A. Well, I looked around—I mean I used to read all the magazines, Vogue and Harper's and National magazines, where perfumes were most extensively advertised, and nobody had ever heard of it, and I had never seen or heard of it.

"Q. When you say no one had ever heard of it, whom did you talk to?

"A. Oh, buyers in the perfume departments of various stores.

"Q. Did you sell any Voodoo to any stores in San Francisco in 1938? "A. No.

"Q. In 1939? "A. No.

"Q. When did you first sell Voodoo perfume to any stores? [84] "A. 1943.

"Q. Prior to 1943 you confined your sale of Voodoo perfume to those who purchased it for their own use?

"A. I confined all my perfume business to those that used it for their own use.

"Q. Then you didn't start selling your perfumes until 1943 to the stores? "A. No.

"Q. For retail sale?

"A. No, we didn't—I didn't, rather.

"Q. Now, do you know that the trade-mark Voodoo was registered by the predecessor of the plain-

tiff in this case in the United States Patent Office in 1938? “A. No, I do not.

“Q. Have you ever seen a copy of the trade-mark registration of Voodoo of the plaintiff in this case?

“A. I don't remember ever seeing it.

“Q. Do you know that it has been filed in this case? “A. Voodoo?

“Q. Yes.

“A. Well, it was filed to my knowledge in 1939.

“Q. Have you ever seen a copy of the trade-mark certificate?

“A. I don't remember if I did or not.

“Q. Now, if you had made a search of the Patent Office [85] records and found the registration of the trade-mark Voodoo in 1938, would you have respected that registration and refrained from using Voodoo on your perfumes?

“A. I don't know what I would have done in 1938, because I was new in the business and I didn't know a lot of things I have learned since then.

“Q. But you do not respect the plaintiff's registration today?

“A. No, because to my knowledge it is a question of usage.

“Q. Have you any knowledge as to the use of the plaintiff's trade-mark Voodoo in places other than San Francisco? “A. Please repeat it.

“Mr. McKnight: Will you read it, please.

“(Question read.)

“A. No, I have no knowledge as to the use of it any place prior to last year.

“Q. When did you first hear of the plaintiff’s trade-mark Voodoo?

“A. A week before Christmas.

“Q. What was the occasion of your hearing of it then?

“A. There was approximately a half page ad run through I. Magnin & Company in the San Francisco Examiner or—yes, the Examiner.

“Q. Are you selling Voodoo perfume at the present time to any stores? [86]

“A. We have a couple of accounts that we recently sold to.

“Q. What are the names of those stores?

“A. One is the House of Fragrance in Seattle.

“Q. Yes. And the other?

“A. I don’t recall offhand. I would have to look it up.

“Q. Have you ever sold Voodoo perfume to any one else—any other store?

“A. Yes, Meier & Frank in Portland.

“Q. How long since you sold Voodoo perfume to Meier & Frank?

“A. I would have to check the records on that to be sure.

“Q. You haven’t sold them for several years, have you?

“A. Well, I would say not for two years.

“Q. What was the occasion for discontinuance of the sale?

“A. We used to have a department in Meier

& Frank's in Portland, and they carried a complete line of all our perfumes, and I found it a little costly. I wasn't big enough yet for such an operation, so we took the department out, and they still continued to carry my perfumes, but they confined it more to our faster selling numbers.

“Q. So that Voodoo has never been a fast selling number with you?

“A. It has been a steady selling number, but not a [87] big number.

“Q. Have you any idea as to the extent of your sales——“A. No.

“Q. ——roughly through Meier & Frank?

“A. Pardon me, please, for the interruption, but did you want more places where I was selling it?

“Q. At the present time do you have any other places?”

Mr. McKnight: The witness originally answered, “No, not at the present time.” Then when he signed the deposition he changed it to “yes.”

Mr. McKnight: (continuing reading) “A. Yes. You asked me where I sold it.

“Q. Yes, and you have stated Meier & Frank.

“A. Yes, but do you want me to go further than that?

“Q. No, I will ask you further at a later time; I will ask for it later. “A. All right.

“Q. Now, will you please tell me those of the twenty-one stores that you desire to add as parties defendant to your cross-complaint? Do you know who they are? “A. I have read them.

“Q. Have you sold Voodoo perfume to any of these twenty-one stores at any time?

“A. No.

“Q. You are not selling them now? [88]

“A. Not Voodoo.

“Q. Are you selling any of these stores any of your perfumes? “A. Yes.

“Q. But you are not selling any of them any of your Voodoo perfume or cologne?

“A. No.

“Q. Is your Voodoo perfume or cologne on sale in any of the department stores in San Francisco?

“A. No.

“Q. Is it on sale anywhere in San Francisco except at 182 Geary Street? “A. No.

“Q. Is it on retail sale at any other place in the United States at the present time except 182 Geary Street, San Francisco? “A. Yes.

“Q. Where?

“A. I would have to check my records to be sure.

“Q. Can you give me the names of any places at all?

“A. I wouldn't want to say offhand, because I would have to look up my accounts receivable records.

“Q. Have you any idea as to how many places of sale at the present time?”

Mr. McKnight: The answer originally, “Oh, I would say not [89] even two or three.” When he signed the deposition he said, “Oh, I would say about six or seven.” Then I asked him again, “Not

over two or three?" And he said, "Yes," then when he signed it he said, "Six or seven."

Mr. McKnight: (continuing reading)

"Q. And where would they be located?

"A. Well, of course, as I stated before, one is the House of Fragrance in Seattle; and then we had a recent order, oh, three or four months ago, from back in Washington, D. C.

"Q. This House of Fragrance in Seattle, Washington,—is that a perfume store, or what is their business?

"A. Perfumes and cosmetics and gift items.

"Q. Do you have any idea of their address in Seattle?

"A. Yes. I think it is 4252 East 45th.

"Q. And how long have they been purchasing Voodoo perfume or cologne from you?

"A. About a year and a half.

"Q. Have you ever seen any of the national advertising of the plaintiff's Voodoo perfume?

"A. Yes.

"Q. Have you ever had any advertising of your Voodoo perfume or cologne? "A. No.

"Q. Of any character? [90]

"A. Other than what you would see on that price list.

"Q. That is, you have done no advertising of Voodoo perfume or cologne in publications?

"A. No.

"Q. Now, referring to this list, Mr. Rolley, Plaintiff's Exhibit 1 for identification, what is your No. 1 Mandalay a reproduction of?

“A. Well, that is a matter of opinion.

“Q. Well, you state that they are reproductions don't you? “A. That is 1943.

“Q. Yes.

“A. I don't make the statement today, and haven't for years.

“Q. But in 1943 you did state they were reproductions, did you? “A. Yes.

“Q. What was it a reproduction of?

“A. Shalimar. We discontinued this entirely at that time by mutual agreement and understanding with certain representatives of the perfume industry, and have never since that time ever deviated from it.

“Q. Did you have any complaints on that language from perfume houses?

“A. Not from perfume houses, no.

“Q. Who did you have complaints from? [91]

“A. Well, one of their attorneys.

“Q. Attorneys for perfume houses?

“A. Yes.

“Q. Which houses?

“A. He didn't tell me.

“Q. But he objected to your using the word reproductions'?

“A. Yes. We had a discussion on it, and I think he pointed out to me that it wasn't permissible, so I agreed to discontinue it, and did so promptly, and have always abided by the understanding that we had.

“Q. Do you think that a trade-mark is an important factor in the sale of perfume?”

“A. Certainly.

“Q. Why do you say that?”

“A. Well, the name—a name is very important.

“Q. Would you say that you obtained repeat sales from the use of a trade-mark?”

“A. No, you get repeat sales on the quality of a perfume.

“Q. That is, people remember the name?”

“A. They will remember the name of the fragrance, yes.

“Q. Now, have most of your sales of Voodoo perfume and cologne been in San Francisco and California?”

“A. Recently the biggest percentage of it has been, yes.

“Q. How large a percentage? [92]

“A. Well, I wouldn't say.

“Q. Would you say substantially a hundred per cent?”

“A. Oh, no, no, I would not be able to give you an idea on that. I would have to audit my books to find that out.

“Q. Well, would you say substantially more than half has been sold in California?”

“A. I would say more than half, but I wouldn't use the word 'substantially,' because that word means a lot of things.

“Q. Well, let's get this clear. Would you say that more than half of your sales of Voodoo per-

fume and Cologne has been in the State of California? “A. Recently.

“Q. Well, now, in the past—

“A. Not a few years ago it wasn't. A few years ago we sold more Voodoo perfume wholesale throughout parts of the United States than we did retail.

“Q. Now, what other places that you sold Voodoo perfume than Seattle, Washington?”

Mr. McKnight: At the time the witness signed the deposition he said: “Seattle, Washington; Honolulu, Hawaii; Sacramento, California; Washington, D. C. Those are the only places I can recall at this time.” At the time he signed the deposition he added Alaska, Oakland.

Mr. McKnight: (continuing reading) [93]

“Q. Can you give us any figure as to the extent of the sales of your Voodoo perfume altogether?

“A. No, I would know.

“Q. What is the retail price of your Voodoo perfume per dram? “A. \$2.00.

“Q. And per ounce?

“A. We don't have a straight ounce. We have an ounce and an eighth that runs \$16.00.

“Q. What is the price of your Voodoo cologne?

“A. \$2.75 for a four-ounce bottle.

“Q. That is the retail price?

“A. Retail. These are all retail prices.

“Q. Yes. Do you have any other packages of Voodoo cosmetics of any kind?

“A. Hand lotions.

“Q. What is the price on that—the retail price?

“A. Well, all our hand lotions, regardless of fragrance, sell for \$1.00 retail.

“Q. So that you have Voodoo perfume in one dram and an ounce and an eighth?

“A. No, we have it in one dram, quarter ounce, half ounce, and one and an eighth ounce, and then we have it in cologne, and we put up our fragrances in body talc and sachet and bath oil. [94]

“Q. Now, did you ever have any trouble with Merle Norman? “A. Never.

“Q. Did you ever have any sales to them?

“A. Pardon me?

“Q. Did you ever have any sales to those people?

“A. Not to the Merle Norman Manufacturers. We used to do a very substantial business percentagewise with many of their retail outlets.

“Q. Did you ever have any lawsuit with them?

“A. There is one, I believe, that is filed or being filed right at the present time.

“Q. What is that in relation to?

“A. If I understand it correctly, they call it unfair business practice, conspiracy in restraint of trade.

“Q. Against Merle Norman?

“A. Well, we are filing it against them. They are the ones that committed the act.

“Q. Who is Margery Bell in Washington, D. C.?

“A. Well, Margery Bell at one time had a business in Washington, D. C., and also she sold the product for us to whoever had the concession in the

Statler Hotel—now, wait a minute. Is that the name of the hotel in Washington?

“Q. Castleton?

“A. No, the Statler; that is the one, the Statler Hotel. [95] And then she also had a dress shop, or a modiste, she called it, and she recently tried out our perfumes, and so forth, there.

“Q. Was she one of your sales persons?

“A. Afterwards, no. She at one time was, and then went into business for herself.

“Q. Do you know her address at the present time? “A. Yes.

“Q. What is it please?

“A. The Washington office—well, I would have to look it up in my file to get the exact address. It is Washington, D. C.

“Q. Would you please let us have that?

“A. Yes, sure.

“Q. And furnish that to the court reporter?

“A. Sure.

“Q. Is she a relative? “A. No.

“Q. Is she a friend?

“A. Well, I have known her for a long time.

“Q. What was the occasion for your first meeting her?

“A. Well, I don't remember, it is so long ago.

“Q. Well, how did she happen to start selling Voodoo perfume for you?

“A. She wrote me one time and—I sent her some perfumes [96] and things for Christmas for a gift, and she wrote and told me that she was quite surprised because she saw my name on them, our

label, and so I replied and told her what I was doing, and considerably—sometime considerably later I went to New York in—let's see, 1938—no, that was not the first time—I don't remember the time I went to New York now, but it was in the early forties, and so I told her I was going back there, and so she asked me to please come on to Washington, and so my wife and I went on to Washington, and she told me she was very interested in getting into some business of her own, and I told her at the time I wasn't quite ready for such fast expansion, and so—well, we corresponded for a while and later on she wrote me and wanted to keep—she wanted to represent me, which she did for a while in through that territory.

“Q. About when was this, Mr. Rolley?

“A. Well, it was around 1944 or '45. And then she decided to go into business for herself. Travel was too tough during the war.

“Q. And did she sometime later go out of business?

“A. Yes.

“Q. How long was she in business for herself?

“A. If I remember correctly, approximately two years.

“Q. After 1945? [97]

“A. Yes, approximately from 1945 to 1947.

“Q. Now, does Rolley, Inc., have any registration of the trademark Voodoo in the United States Patent Office?

“A. No.

“Q. Have you ever filed an application for such registration?

“A. No.

“Q. What is the litigation that you have with Merle Norman regarding unfair practices?”

“Q. Do you sell Merle Norman Voodoo cosmetics?”

“A. We don’t sell Merle Norman anything now.

“Q. Have you ever sold them Voodoo cosmetics?”

“A. Not Merle Norman. We sold a retail outlet of one of Merle Norman’s accounts.

“Q. Is that the one in Sacramento?”

“A. That is the one in Sacramento.

“Q. Is that the one you are suing?”

“A. We are suing the manufacturer, basically.

“Q. Well, does this store in Sacramento have anything to do with it?”

“A. Oh, sure, because they are the ones, or one of the ones that the Merle Norman Company forced into the boycott.

“Q. Were they boycotting Voodoo perfume at that time?”

“A. No, they were boycotting Rolley, not Voodoo.

“Q. Including Voodoo perfumes? [98]

“A. Including everything I had.

“Q. You mean by ‘boycotting’ that they were refusing to buy from you?”

“A. Merle Norman ordered them to discontinue buying Rolley products, under the threat of no longer selling them cosmetics.

“Q. And your suit is pending against them where—against Merle Norman where? Here in San Francisco?”

“A. I presume so. My attorney knows. I don’t know.

“Q. In the Federal Court or the State Court?

“A. That I don’t know.

“Q. Does Rolley, Inc., own any registration of the trademark Voodoo in any state of the United States? “A. No.

“Q. Have you ever filed an application for the registration of Voodoo in any state of the United States? “A. No.

“Q. So that any rights that you claim to the trademark Voodoo are not based on registration of any name? “A. It is based on usage.

“Q. But it is not based on any registration?

“A. No.

“Q. Who made your labels with the trademark Voodoo in 1938?

“A. A place called Quick Print Press. [99]

“Q. Where is that located?

“A. I don’t know where they are now. They are in the telephone book.

“Q. A San Francisco concern? “A. Yes.

“Q. Is it still in business?

“A. Yes, it was the last I recall—at least four or five months ago.

“Q. Is that where you got all of your early labels for Rolley perfumes?

“A. In the beginning, yes.

“Q. And in those days did you call them all Rolley perfumes?

“A. Oh, yes; everything has been called Rolley, but not the fragrance.

“Q. I mean did you have the word ‘Rolley’ on all of your labels? “A. Yes, sir.

“Q. And in addition to the word ‘Rolley’ you would have another trademark?

“A. Yes, that’s right.

“Q. And you say that those labels were printed for you by the Quick Print Press in San Francisco?

“A. Yes.

“Q. Is that the concern down here at 942 Market Street, San Francisco? [100]

“A. That’s right.

“Q. That concern was not located there at the time you bought them?

“A. I don’t know; I don’t remember now where they were then.

“Q. For how long a time did they print your labels? “A. I don’t remember that either.

“Q. A thousand? Five thousand?

“A. Well——

Mr. McKnight: At the time of taking the deposition he said, “A hundred? A. Well, more than that,” “I do think it would be five thousand.” Then he changed that to, when he signed the deposition, “I do think it would be five thousand.”

Mr. McKnight: (Continuing reading).

“Q. Have you any other information that you can give me today in regard to your alleged sale of Voodoo cosmetics in 1938?

“A. We took a lease on the——

“Mr. Brown: No, he asked you about sales.

“A. Pardon me.

“Mr. Brown: He is asking you about the sales, individual sales.

“A. What do you mean? To individual people?

“Mr. McKnight: Yes.

“A. Oh, no.

“Q. So that all you can give me is this one person who [101] died, and this other person whose name you can't recall? Is that correct?

“A. That's right. I didn't keep a record of names and addresses at the time.

“Q. You don't have any record now of that?

“A. Oh, no; that was years ago.

“Q. So that all the information you have is oral, only from memory in regard to those early sales of Voodoo? “A. That's right.

“Q. You don't have any written documents on the subject at all? “A. No.

“Q. Have you any record of sales?

“A. No.

“Q. Do you have any ledger?

“A. Not that far back, no; I wouldn't keep my books after so many years.

“Q. When do the books begin? How far back do they date?

“A. My personal records before I was incorporated?

“Q. Yes.

“A. I don't know offhand. I would have to look them up. It was just a little black book I kept notes in.

“Q. Do you have that little black book today?

“A. I don’t know if I have the original one or not.

“Q. But you have nothing documentary?

“A. Prior to what date? [102]

“Q. 1944? “A. No—1940.

“Q. 1940 was the beginning of your documents? Is that right?

“A. Yes, that’s right; either accounts or any printed matter or anything else that I could produce.

“Q. You haven’t any of your first invoices of sale of a Voodoo in 1938, or copies of them?

“A. Oh, no.

“Q. So that anything like that you don’t have before 1940?

“A. No. We just used to make out a little tag, and then I would enter the tag in my little book, and that was all.

“Q. Have you any copies of your original labels? “A. No.

“Q. What labels have you got today of your earliest use? Have you any early labels going back—

“A. Well, I could look, but I don’t think—

“Q. Have you any labels prior to 1944?

“A. Well, not the same early labels, because I used them up and had some reprinted.

“Q. You didn’t keep any of the old ones?

“A. No, I didn’t keep them—unless there would be one lying around or a few lying around some place.

“Q. What are the earliest orders that you have

from stores or from individuals for the sale of Voodoo colognes [103] or cosmetics of any kind?

“A. For the stores would be sometime in 1943.

“Q. And from individuals?

“A. From individuals I didn’t—well, I wouldn’t have a written order.

“Q. You never had any written orders from individuals?

“A. No, they would just merely come in and pay cash for it, and that was it.

“Q. So the earliest documents that you have with relation to the sale of Voodoo perfume or cologne dates back to about 1943 or ’44? Is that right?

“A. That’s right—I beg your pardon. I would like to add something to that.

“Q. Please proceed.

“A. That one particular sheet of paper that you had me look at before was made in 1943, and the name Voodoo was on it, and—

“Q. Where is that? “A. In my hand.

“Q. You say that that was prepared in 1943?

“A. No, it was prepared—that was prepared prior to 1943, but I don’t know when.

“Q. Well, was it any earlier than 1940?”

Mr. McKnight: The witness answered at that time, “No, not earlier than 1940.” When he signed the deposition he wrote, [104] “I can’t recall.”

Mr. McKnight: (Continuing reading).

“Q. Was it any earlier than 1942?

“A. I would say yes.

“Q. In fact, there is a letter on the back of it dated October 12th, 1944? Is that right?

“A. That is correct. I used them when I discontinued price sheets for our products, as I referred earlier. Rather than just throwing them away, I used the other side for second sheet.

“Q. You were in business as Charles A. Rolley, an individual, prior to the formation of Rolley, Inc.?

“A. That’s right.

“Q. And Rolley, Inc., is the successor to you as an individual?

“A. Yes. We didn’t call it Charles A. Rolley; we merely called it Rolley Perfumes.

“Q. And that Rolley Perfumes really meant Charles A. Rolley doing business as——

“A. That’s right.

“Q. And were you the sole owner?

“A. Yes, sir.

“Q. Was there anybody that worked for you at that time?

“A. Oh, yes.

“Q. Do you have any one in mind that worked for you in [105] 1938? When you got started?

“A. Yes.

“Q. Any one living at the present time?

“A. Yes.

“Q. Can you give me the names and addresses?

“A. Well, I haven’t been able to check them yet. I have been trying to do that, because I want to find them, more so I think than you do. There is one man I hope to locate in the near future.

“Q. What is his name?

“A. He is not living in San Francisco. His name is Roy Rodberg.

“Q. What did he do?

“A. He just worked with me, helped me out in all the different work.

“Q. Was he the only employee you had?

“A. Well, at one time. Of course, we had others.

“Q. Well, during the period from the time you started in the business of selling perfumes up until 1944?

“A. Oh, no, I had different employees in that period of time.

“Q. All right. Let us say between 1938 when you started, and 1940, who worked for you besides Roy Rodberg?

“A. I would have to check away back in my records to find that out, because I don't remember; there have been [106] a lot of people that worked for me since then, and I wouldn't know for sure.

“Q. Men or women?

“A. I have had both since then.

“Q. Didn't you do most of the selling yourself?

“A. You mean at that time?

“Q. Yes.

“A. I did a good percentage of it, but he did quite a bit of it, too.

“Q. At the place on Stockton Street did you manufacture the perfumes there? “A. Yes.

“Q. And sell them from there?

“A. At 212 Stockton?

“Q. Yes. 212 Stockton Street. “A. Yes.

“Q. And that continued until when?

“A. April, 1940.

“Q. And where did you go then?

“A. 239 Geary Street. The reason I moved was because our business in perfumes was getting better, so I needed a better place and a little more room.

“Q. At 239 Geary Street who worked for you when you first went there?

“A. A girl by the name of—well, Roy Rodberg worked [107] with me there for a while, and then he was drafted, and then I had Natalie Anis.

“Q. Where is she employed now?

“A. She is still working for me.

“Q. And when did she first start working for you?

“A. She came to work for me when we moved over there, within thirty days, so it would be April or May, 1940.

“Q. You don't know of any one whose name you can give me today that worked for you selling Voodoo perfumes and cologne prior to 1940?

“A. I am going to try and find out what the present name of this party is in Sacramento, and I will have to find somebody that I know that knew her then, and find out what her name now is, and see if I can locate her.

“Q. And she is the only one you had?

“A. That is the only one that comes to my mind at present, yes.

“Q. And what was her maiden name?

“A. I don't remember.

“Q. And she worked for you when?

“A. No, she never worked for me.

“Mr. Brown: She was a customer.

“Mr. McKnight: Q. Oh, she was a customer?

“A. Yes.

“Q. But there was no one who worked for you that sold [108] Voodoo perfume or cologne for you prior to 1940 that you can recall now?

“A. Roy Rodberg.

“Q. That is the only one?

“A. The only one that I can remember, yes; he would be the only one that sold it.”

Mr. McKnight: I would like to offer in evidence Plaintiff's Exhibit 1 at this time.

Mr. Hutchnson: That is particularly this price sheet?

Mr. McKnight: That is right.

Mr. Hutchinson: We would like to object to that being received, if the Court please, because it long antedates any of the issues herein, and relates only to Voodoo in so far as any issues herein is concerned. That is, it was used in 1943. If counsel wishes to stipulate, we will join with him it was in 1943 and before, item 54, Voodoo, was offered and sold at the prices there, and we object to all the other as being outside the issues of this case.

Mr. McKnight: I think it shows the entire picture. It is admitted by the defendant and is particularly important because it shows the essence of unfair competition. It is a document that has these Rolley reproductions on it and I think it is important to tie in with the element of intent in this case.

Mr. Hutchinson: I would like to have it noted

in the [109] record and called to your Honor's attention that at a proper time we will, of course, object to any claim of reproductions or other things that wouldn't relate to Voodoo, and the evidence is clear it is always claimed as an original. The deposition is now being offered?

Mr. McKnight: I will offer what I have read for the purpose of the admissions.

Mr. Hutchinson: Very well. I would like to make some reservations under the same understanding I had before, to be ruled on when the case is submitted.

First, I would like to object to portions of the deposition, and I needn't detail them now, that relates to all names other than Voodoo, for the reason stated; and particularly with reference to Tabu, Forbidden, and its variants, as referred to there.

Second, those portions that deal with sales or absence of sales to stores now being sold by the plaintiff, that being entirely immaterial, in addition to the other reasons stated earlier.

Third, reference to all other brand names, those related to other owners, asserted or referred to in the testimony, as well as to those of the cross-complainant and defendant; and, fourth, any reference to the Merle Norman affair. That is entirely a matter before and between other parties, couldn't possibly refer to Voodoo, and there is nothing in the deposition [110] that suggests any other. And that ruling be reserved until later.

The Court: Very well.

Mr. McKnight: That closes our prima facie case, your Honor. We rest.

Mr. Hutchinson: If the Court please, we do not at this time propose to make a motion for non-suit for the reason that we are cross-complainants here and, as remarked earlier, we are all here from some distance, and having put the Court to the trouble of hearing this, I think it is better to hear the record as we are set.

We ask relief by way of injunction. I would like it noted, it is my understanding of this record now there is no showing of any use or usability or sale by the name Voodoo, or anything presented by the plaintiff in any of those three western coastal states I have mentioned, Honolulu, Alaska, or Washington, D. C., prior to the date referred to by the plaintiff in his deposition as read; and particularly anything prior to 1948 in those area.

Also, there is no showing of any sales anywhere prior to 1948, as I recall the record.

With that understanding, we will proceed to our testimony, your Honor, and I will call Mr. Rolley. [111]

CHARLES A. ROLLEY

a witness called on behalf of defendant and counter claimant, being first duly sworn, testified as follows:

The Clerk: State your full name and occupation to the Court.

A. Charles A. Rolley—R-o-l-l-e-y—Manufacturer of—retailer of perfumes and cosmetics.

(Testimony of Charles A. Rolley.)

Direct Examination

Mr. Hutchinson: Q. Mr. Rolley, what is your business or occupation, or connection with business houses? A. I beg your pardon?

Q. What is your business or occupation at the present time?

A. I am the President of Rolley, Inc., and General Manager of the same, and my work is to manufacture perfumes, promote them, advertise them, and generally manage the business.

Q. That is a California corporation, is it?

A. Yes.

Q. When was it organized in California?

A. It was incorporated April 30, 1946. Now, I may be two or three days off in that exact date.

Q. In any event, it was the first half of the year 1946? A. That is correct.

Q. Prior to that time, that is, immediately prior, what was your personal business, if any?

A. I was in the same business, but I was sole owner of the [112] business.

Q. So at that time, at the time the corporation in effect took over the business, you had been handling it as a personal and individual operator, is that correct? A. That is correct.

Q. And you operated it, I believe, the comments in the deposition, as Rolley Perfumes, is that correct? A. That is correct.

Q. Prior to your entering into the perfume work, what was your business or occupation?

A. Well, many years before I went into the

(Testimony of Charles A. Rolley.)

perfume business I was manager of the Frank Moore Shoe Stores. Then I went back to New York and managed I. Miller's there, then I came out and went to work for Ransohoff's for a short time. Then in 1931 I opened up what I called the San Francisco Dye Works.

The Court: A dye corporation?

A. Yes, a dye corporation. That was the dyeing of shoes and bags, gloves, and suede things like that. And in 1933 I made my first perfumes. Now, I didn't go into any form of cosmetics until many years afterwards. By cosmetics I mean face creams, make-up, lipstick, and stuff like that.

Mr. Hutchinson: Q. In 1933, then, was your first contact with the perfume business in any way?

A. That is correct.

Q. Prior to that time had you been engaged in any sort of [113] manufacturing? A. No.

Q. You had been an employee of the establishment you refer to, is that correct?

A. That is correct.

Q. So that this dye work consisted of a service trade, so to speak, is that correct?

A. That is right.

Q. You didn't purchase or sell any particular product?

A. For a little while there I tried to sell shoe dyes.

Q. And that was a very short lived operation, is that correct? A. Yes, it was.

Q. And you had not had any particular training

(Testimony of Charles A. Rolley.)

at that time, had you, in merchandise or copyrights and trademarks and that sort of thing?

A. I had training in retail merchandise in the shoe business, but not any pertaining to copyrights or that.

Q. As a matter of fact, they do not generally trademark shoes, isn't that so?

A. No. The only thing is the manufacturer's name, to my knowledge.

Q. In your business of this dye works, where was your first place of business?

A. Just a moment, please. 285 - 287 - 289—it would be, [114] I think; 289 Geary Street; two entrances in the St. Paul Building one on the corner of Geary and Powell Streets.

Q. That was an upstairs location, was it?

A. That was one room.

Q. One room. Subsequently you moved some other place?

A. A month or six weeks later I moved to 212 Stockton Street.

Q. That is the Stockton Street address referred to in the deposition, is that right?

A. That is right.

Q. I believe in the deposition you previously stated it was 240, didn't you?

A. That was confused. After I gave that address I got thinking, and after all I had never been in the 240 Stockton Building, and I got confused in the number.

(Testimony of Charles A. Rolley.)

Q. How long did you stay in the 212 Stockton Street number, do you recall?

A. Until some time in 1939.

Q. From 1933 to 1939, is that correct?

A. No, from 1932 to 1939.

Q. 1932 to 1939. And your principal business at the beginning was this renovation, dyeing and rehabilitation of leather goods, is that correct?

A. In the beginning, yes.

Q. In 1933, I believe you stated, you started doing something [115] with perfumes. Will you tell us very briefly what that consisted of in the early part of 1933?

A. Do you want me to tell you how it started?

Q. Yes, in a brief way.

A. There was a Mr. Moreland came up to my place one time there, and he was selling chemical supplies, and at that particular time, as we all know, there was a depression on. At the time the banks were closed, and things like that.

I had been offered a sales manager's job for a New York City cosmetic house, so I had, of course, to take on training with them on cosmetics, and after I spent a couple of months there I decided I didn't want to continue there because I couldn't see any financial future in it for myself.

But in the meantime this Mr. Moreland had come to my place and he had asked me where I got the cosmetics, and I told him what had happened, and he asked me did I pay for them and I said "Yes." I told him I got a 60 per cent discount. He told me I was a sucker because it cost them about 15 cents

(Testimony of Charles A. Rolley.)

a jar and I was paying, about, even with the 60 per cent discount, over a dollar a jar.

We had a discussion that I told him he was exaggerating and I didn't believe it. So he told me he would prove it to me. So a few days later he came back up to my place by prearrangement and we made some creams and kept a record of what it cost, and he proved to me that it would only cost 15 [116] cents a jar. Then he took a jar home to his wife, I took a jar home to my wife for criticism, and they said it was a little stiff, or something, so we made some more then. He came to my house, and we sort of waited three or four days until we had the sort that women like. And my wife said, "Feels good, but it doesn't smell good."

I said, "It doesn't smell bad," but she says, "It isn't perfumed."

I went back and told Mr. Moreland that and he said, "That's got nothing to do with it." I says, "After all, women like perfume." I said, "I am going into the business." He said, "You want to go into the business, go ahead."

So any place I could make a dollar in those days, I was looking for it. So I got intrigued with it, and he says, "If you want to go into it, I will show you the angles, I will show you where you get your stuff, I will show you what contacts to make."

It was through Mr. Moreland, then, and those contacts and everything he did in assistance with me, got me started in the perfume business.

Q. Except for the couple of months training you

(Testimony of Charles A. Rolley.)

had as a prospective sales manager for the Middle West cosmetic house, you had never had any other business dealings with the perfume or cosmetic business, is that right? A. No, never. [117]

Q. You didn't make any particular study through analysis of cosmetics or scientific treatises at that time? A. No.

Q. During 1933 did you then make any actual perfumes?

A. Yes, in the fall of 1933.

Q. What did that consist of?

A. I made five or six different perfumes.

Q. Did you make them in quantity?

A. Not too much, because we were working mostly on samples from manufacturers.

Q. That is, the raw materials? A. Yes.

Q. Did you attempt to name any of those products?

A. Not at Christmas time, because I gave things away to different girls around the different stores that I had been doing business through, and instead of giving them a box of candy or something, I gave them a little bottle of perfume.

Q. They were not represented as being any particular name or kind?

A. No. In fact, I didn't recall even what girl I gave what perfume to.

Q. After this Christmas distribution, did you do anything further with naming perfumes?

A. Yes. After Christmas different girls called me and thanked me for it, and told me they thought

(Testimony of Charles A. Rolley.)

the perfume was [118] wonderful and where did I get it, and started asking concerning the brand and name, so I didn't like them to know I made it. They wanted to know if they could buy it at a cheaper price than they were accustomed to paying. So I decided if I was that good, had talent which I hadn't realized before, I was going in the business. So that is when I started actually going in the perfume business.

Q. That was early in 1934?

A. That would be early in 1934.

Q. What did you then do in a general way in the perfume business? Did you or did you not then undertake to make perfumes and bottle them and sell them?

A. I made perfumes and bottled them, and I would have customers come up to my dye shop, and I had a little display there in a case and they would comment about the perfumes, so I would sell them the perfume.

Q. As a matter of fact, those customers were, in part at least, retail purchasers, is that not so?

A. I beg your pardon?

Q. Those customers in general were largely retail purchasers of your services in the dye shop?

A. That is right.

Q. And you started selling them at that time, is that correct? A. That is right. [119]

Q. At the very beginning can you recall any of those products you developed in the perfume field by name? A. Yes, I do.

(Testimony of Charles A. Rolley.)

Q. Will you state a few of the names you first used?

A. One was Forever, Garden Pinks, Red Red Rose. Well, those were the very first ones. Then some of the others I gave numbers to.

Q. At one time I believe you had what you called reproductions in your perfumes?

A. That is right.

Q. Will you tell us very briefly what that consisted of and when you did it, and if you did.

A. People would come to me and ask me if I could make a perfume like some perfume they had been buying, and I would tell them I would try, so I would work and make that particular perfume they had liked, and they would buy it. That was a reproduction. It was my interpretation of the fragrance of some other perfume.

Q. Were those given any particular name, those so-called reproductions?

A. Oh, no, they were given numbers.

The Court: Pardon me, what do you mean by a reproduction? I don't clearly follow.

Mr. Hutchinson: These items which were made up as his impression of other existing perfumes.

The Court: I think they are referred to as reproductions?

Mr. Hutchinson: Yes. I don't mean to say they are actually reproductions, but that is the name that has been used in the deposition, and, I think, in the pleadings.

The Court: It has been repeated a number of times.

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: Yes.

A. I would mean it is my interpretation.

Mr. Hutchinson: Q. In other words, you did not analyze anyone's perfume, or have it analyzed, or copy therefrom?

A. No, you don't have to do that. You do it with your nose.

Q. This is an idea or concept of yourself of the nature and quality of the scent that they liked, is that correct? A. That is right.

Q. You did this type of thing for how long, do you remember?

A. I did it until 1943.

Q. At that time I think from your deposition it appears that you were called upon by some representative of some perfumery association, or something of that nature is that right?

A. That is right.

Q. At that time you were advised that that was of doubtful propriety from their point of view, is that correct? A. That is right [121]

Q. You were not sued or prosecuted?

A. Oh, no.

Q. Was that your first realization that what you were doing might or might not be in question?

A. That is correct.

Q. The other perfumes that have been referred to, those by name, from the beginning, were your own concept, is that true?

A. My own origination.

Q. What about the names you gave them? Where did you get those?

(Testimony of Charles A. Rolley.)

A. We would hunt for names almost any place, try to create a name that would fit our particular perfume.

Q. Did you attempt to copy or did you in fact copy anybody else's names for these perfumes?

A. Never. Never intentionally.

Q. In particular reference to some that have been referred to here, did you ever use the name Tabu, spelled either T-a-b-u or T-a-b-o-o?

A. I have never used it.

Q. Have you ever used "Forbidden" in any connection?

A. I used many years ago "Forbidden Flame."

Q. Do you recall the date when you used it, and the date when you ceased to use it?

A. It would be some time in the, oh, the middle or late '30s I first started to use it, and I discontinued using it [122] in 1934 to 1935.

Q. Now, did you at that time—

A. I mean—pardon me—I didn't mean to say 1934 to 1935. I mean 1943 to 1945.

Q. At the time you adopted and used that name, was that your impression, reproduction, or anything of that kind of any other perfume?

A. No. Well, we might possibly have used another perfume at that time called *Toujours Moi*.

Q. Is that related to *Forbidden Flame*?

A. The fragrance would be similar.

Q. And—

Mr. Hutchinson: By the way, I might inquire of counsel if that is one of the products that is complained of here?

(Testimony of Charles A. Rolley.)

Mr. McKnight: No, because the *Toujours Moi* is a product of another concern called *Cordet*, I believe.

A. That is right.

Mr. McKnight: It is a famous perfume.

Mr. Hutchinson: Q. At that time, consciously or otherwise, did you adopt any name related to *Tabu* or any name related to *Taboo*?

A. Never.

Q. Did you similarly with regard to *Forbidden*, if that were related to *Tabu*— [123]

A. Would you repeat that?

Q. I will withdraw that. It is rather complex. Did you consciously, in the words "*Forbidden Flame*" intend to suggest *Tabu*?

A. No, definitely not. I couldn't see any connection.

Q. Did any of your customers at that time, as you now recall, indicate any error or mistake as between the two? A. Never.

Q. With reference to *Voodoo*, do you recall when you first used that name?

A. It was some time either in '34 or '35. I can't give you the exact date.

Q. Where were you maintaining your operations at that time? A. 212 Stockton Street.

Q. Do you recall who was working for you at that time, if anyone?

A. I wouldn't know, sir. I wouldn't know whether it was a fellow by the name of *Larry McKay*, whom I have been unable to trace, or might

(Testimony of Charles A. Rolley.)

have been another fellow that at the time worked for me for about three months.

Q. Do you recall the perfume you made and sold under the name of Voodoo?

A. Oh, surely.

Q. Was it a reproduction or impression of yours of any [124] other perfume?

A. It is an original creation of mine.

Q. And at all times it had remained so, is that correct?

A. That is correct.

Q. You were then engaged in a retail business, is that correct?

A. That is right.

Q. Didn't do any wholesale, or didn't attempt to sell wholesale?

A. No.

Q. What manufacturing equipment you required was maintained in the same establishment with your dye equipment, is that right?

A. Also had some at home.

Q. This wasn't your only business in these times?

A. No, I still have the dye works.

Q. Do you remember any of the customers you had for Voodoo in the early years, 1934, 1935?

A. Of course I remember Mrs. Coffey very well. And not as early as 1934 and 1935, but in 1938 I remember another woman that was brought out in this deposition, but she has been married about three times, and I can remember her first name, but I don't know what her last name is now.

Q. Were your services——

A. (Interposing) May I continue? [125]

(Testimony of Charles A. Rolley.)

Q. Excuse me.

A. Since the last years I have made contacts, or had contacts made with me with other persons who have recalled buying the perfume as early as 1935, and I didn't remember their names until, of course, they come into my present shop and happen to bring up the fact that they remember me when I first started out, and how happy they are to see me getting ahead, and things like that.

Q. Have you inquired of them their recollection of having purchased Voodoo? A. Yes.

Q. Are any of those purchasers now available who were customers at that time that you didn't mention in your deposition?

A. One has promised to be here, and the other is trying to get permission from her husband to come here.

The Court: What is that? Woman trying to get permission from her husband to come?

Mr. Hutchinson: She is in Sacramento.

The Court: Why does she have to get permission?

A. She just says her husband objects to it.

The Court: What is his business or occupation?

A. This woman lives in Sacramento and I have merely talked to her on the long distance telephone, and I don't know him. I have known her a number of years, but she has been remarried and I don't know what he does. [126]

The Court: Maybe he is looking askance at you. Did you ever meet him?

(Testimony of Charles A. Rolley.)

A. No, sir, I haven't. He is afraid of lawsuits, or something, I think.

Mr. Hutchinson: Q. You continued in your retail trade until what time? When did you start selling to other stores? A. In 1943.

Q. In the meantime had you moved from 212 Stockton Street?

A. Yes, I had. We moved to 239 Geary. We have moved several times since, but from 212 Stockton we moved to 239 Geary Street, again upstairs.

Q. Had you moved again after that before you started wholesale? A. Yes, 108 Geary Street.

Q. Was that a street level shop?

A. That was a street level shop.

Q. Were you still engaged in the dye works at that time? A. No, I gave it up then.

Q. What year was that? A. 1943.

Q. From 1943 on you personally engaged exclusively in the perfume business, is that correct?

A. Yes. Pardon me, during the war I worked nights in the shipyard, too, for a year.

Q. But as far as business activities, as such?

A. Yes.

Q. They were exclusively in the perfume business? A. Yes.

Q. You started your wholesale shop at that place, or did you take another place for that?

A. We took another place for that shortly thereafter.

Q. Where was that? A. 365 Sutter Street.

Q. And you there had a plant for manufacturing the perfume, is that right?

(Testimony of Charles A. Rolley.)

A. Yes. We had in the front a small retail outlet, but had a pretty good area in the rear which we used for our manufacturing.

Q. Subsequently you took up another address on Mission Street, is that correct?

A. That is only a little over 3½ years ago we moved our manufacturing over to 718 Mission.

Q. During this period in which you were engaged exclusively, personally, in this business, a solely owned corporation, had you continued to use the name Voodoo and to have for sale a product which you then identified by that name?

Mr. McKnight: That is objected to as not clear. I don't understand the question. Will you make it more specific please?

Mr. Hutchinson: Well, perhaps we can make it more specific. [128]

Mr. Hutchinson: Q. As I recall your testimony up to this time, you started using Voodoo in conjunction with a particular perfume as one of your trade names in 1934 or 1935 at the latest? Did you continue to use it in connection with your business in relation to a perfume from then until the incorporation of your present company?

A. Yes, we have used it until now, and continuing it.

Q. In fact, you are still using it?

A. Still using it.

Q. At the time of the incorporation did you transfer to the corporation all rights you had in the perfume business, names, and other things?

(Testimony of Charles A. Rolley.)

A. I transferred all formulas, all rights, and all copyrights, equipment, everything.

Q. Since that time, if I understood your earlier reply, the company has continued to use the name and sell it in conjunction with perfumes, colognes and creams, other cosmetics, is that correct?

A. Perfumes, colognes, body talc, bath oil, sachet and hand lotions. [129]

* * * * *

Q. Then if I understand it straight, your Voodoo product was used in conjunction with perfume and cologne from 1934 or 1935, at the latest, to date, and with regard to sachets and body talcs, how long?

A. Perfumes, I used it first in perfumes only for a few years, when we expanded into colognes, then it was in 1942, I guess, we went into light body talc and sachets.

Q. And the creams at a later date? Did you use Voodoo in conjunction with them?

A. No, in creams there is no connection with fragrance at all. [130]

* * * * *

Mr. Hutchinson: Q. Mr. Rolley, prior to the year 1949 did you ever see the name Voodoo advertised in conjunction with cosmetics, including perfumes, other than in conjunction with your own business? A. No, never.

Q. Did your customers, wholesale or retail, ever advise you and inform you that any such product was on the market by any other person? Prior to 1949, I am referring to.

(Testimony of Charles A. Rolley.)

A. They didn't advise me of the product being on the market. They advised me of their never having heard of it prior to that time.

Q. You mean subsequent to that time?

A. Pardon me?

Q. They subsequently so advised you, subsequent to 1949?

A. They advised me of that after the first ad I seen of Dana's advertising Voodoo.

Q. You then made inquiry of your customers and other persons on that subject?

A. Yes, I did.

Q. When did you first become aware of any product being [131] sold, that is in that field, by the name Voodoo other than your own?

A. About a week before Christmas in 1949.

Q. And where and what did you see in that connection?

A. I saw an ad in the women's section of the San Francisco Examiner, the Sunday paper. It was an ad by I. Magnin & Company.

Q. I believe we have a copy of that ad if I can locate it. Did you retain the ad, do you recall?

A. I don't have it at present. I cut it out at that time.

Q. 1949 in December, eh? This particular one isn't marked. I assume you are familiar with the advertisement, counsel? (Handing document to counsel.)

I will ask you if you can identify this advertisement as one you saw?

(Testimony of Charles A. Rolley.)

A. May I have my glasses, please?

Q. Yes. A. Yes, this is it.

Q. Did you see that the latter part of December—did you say the 28th?—1949?

A. Just before Christmas in 1949. [132]

* * * * *

The Court: What did you, yourself, do, if anything?

A. After I contacted the stores and called up like Meier & Frank in Portland, and made full inquiry to convince myself that I felt I was in the right on the thing, I wrote a letter to Dana, Incorporated, at Chicago, calling attention to the fact [133] that I had been using the name Voodoo on perfume for a good number of years.

Q. I show you now, Mr. Rolley, what purports to be a carbon copy of a letter bearing the date December 28, 1949, addressed to Dana, Inc., 200 East Illinois, Chicago, Illinois, and ask if you if you can identify that as a letter—copy of a letter written by you. A. Yes, I wrote this.

Q. Is that the letter you wrote to Dana that you just referred to?

A. That is a copy of it.

Q. This is your carbon copy?

A. Carbon copy.

Mr. Hutchinson: If the Court please, at this time we will offer carbon copy identified as Cross-complainant's and defendant's next in order.

Mr. McKnight: No objection.

The Court: It may be admitted and marked.

(Testimony of Charles A. Rolley.)

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Letter dated Dec. 28, 1949, was received in evidence and marked Defendant's Exhibit B.)

Mr. Hutchinson: If the Court please, I think it may be deemed read and we can read it in the argument if need be, and the Court may have it before it. [134]

The Court: It will be copied by the reporter, if necessary.

Mr. Hutchinson: Q. Did you subsequently receive any communication to that letter?

A. Yes, I did.

Q. I show you what purports to be a letter of Dana, and some further name which is in small print, dated the 29th of December, 1949, addressed to Mr. C. A. Rolley, San Francisco, apparently having the name signed "J. D. Gaumer," and ask you received that letter subsequent to the 29th of December, 1949?

A. Yes, I recall seeing this.

Mr. Hutchinson: I will offer this letter in evidence as next in order for the Cross-complainant and defendant.

Mr. McKnight: No objection.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(The letter dated Dec. 29, 1949, from Gaumer to Rolley, was received in evidence and marked Defendant's Exhibit C.)

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: Q. Did you reply to that communication, or did you receive any other communication prior to your further reply?

A. Well, there was further correspondence on both sides since that particular letter. [135]

Q. I believe the letter you just identified, which is Cross-defendant's 2, referred to further correspondence by Mr. McKnight, did it not?

A. They said in their letter their attorney was out of town, and would I please wait until he got back in town, and they would contact me again on it.

Mr. McKnight: Your Honor, as to this point I think Mr. Hutchinson is trying to show notice was given our client in regard to the claim of Rolley, Inc., and I think any further correspondence after the notice is incompetent, irrelevant and immaterial. I don't think it has anything to do with this proceeding, especially anything that might have to do with the subject of settlement by either side.

Mr. Hutchinson: It strikes us, your Honor, that a closely connected series of correspondence should all be received, and we have already received the beginning without objection, and subsequent correspondence had is all part of the same transaction. I don't know that there is any particular reference to settlement. There is discussion of that, but I don't think that is a thing that will make any particular difference to the Court in reaching a decision.

The Court: This correspondence is already in

(Testimony of Charles A. Rolley.)

the record. I will permit anything in relation to that to go in.

Mr. Hutchinson: Q. I show you, then, Mr. Rolley, a letter dated December 30, 1949, on the letterhead of MacKay & [136] Comstock, Law Offices in Chicago, Illinois, signed by James R. McKnight, and ask you if you received that letter shortly after receipt of the letter you have last identified?

A. Yes, I recall getting that.

Q. And subsequently you replied, I believe, on or about the 5th of January, 1950, by a letter which I now show you a carbon copy of, and ask you if you can identify that as your letter to this law firm?

A. Yes, this is my carbon copy of a letter I wrote to them.

Mr. Hutchinson: At this time I will offer the letter dated December 30, 1949, on the letterhead of McKnight & Comstock as cross-complainants next in order.

The Court: It may be admitted and marked.
* * * * * [137]

Mr. Hutchinson: Q. Mr. Rolley, following the correspondence that has just been identified by dates, you requested your counsel to take over the matter, is that correct?

A. Yes, I went to an attorney.

Q. Now, prior to the advertisement you referred to in the San Francisco Examiner just before Christmas in 1949, had you seen any advertisement for a perfume by the name of Voodoo other than

(Testimony of Charles A. Rolley.)

your own in any advertising media coming to your attention? A. Never.

Q. Did you, during those times examine ads relating to the perfumes in newspapers and magazines?

A. I always read Vogue and Harpers and the newspapers of San Francisco, and I read all advertising that in any way might pertain to my work or my business.

Q. Now, has Rolley, Inc., done any advertising in national magazines at any time of its perfumes?

A. Yes, we have.

Q. What national magazines have carried the advertising of your company? A. Vogue.

Q. Any others?

A. That is the only national magazine that I can recall.

Q. You have advertised in the newspapers, have you not? A. Oh, yes, quite a bit.

Q. You have referred in your testimony here and in your deposition to a number of price lists and things of that nature. Did you treat those and use them as advertising media? A. Well, yes.

Q. And that was disseminated to customers and prospective customers, isn't that correct?

A. Yes, that is right. I felt, and we still do, price lists are valuable because we get a lot of tourist trade here and we get a lot of orders then from all over the United States, mail orders.

Q. Do you have at the present time any of the products you sell under the name Voodoo?

(Testimony of Charles A. Rolley.)

A. Oh, yes.

Q. I show you here a number of parcels which were delivered to me earlier this afternoon, and I will ask you if you can identify for us these objects? Would you like to see them, counsel? (Showing items to counsel.) I show you first a carton containing a bottle and a nearly clear liquid, bearing name Rolley, and then expression "Double Rich Cologne," and ask you if you can identify the bottle, the [144] carton, and the contents? A. Yes, I can.

Q. What are they?

A. This is a two-ounce bottle of Voodoo cologne.

Q. That is, the contents of that bottle is cologne under Voodoo, is that correct?

A. That is right.

Q. That is what you have been selling and manufacturing under that name? A. Yes.

Q. This is taken from your stock?

A. Yes.

Q. And the bottle, carton, and so on, are the type of wrapping or container in which you sell this product? A. That is right.

* * * * *

Mr. Hutchinson: Q. I show you a second carton, Mr. Rolley, somewhat larger, bearing the same general designation, [145] and ask you if that is another container you used in a different size for your Voodoo cologne? A. Yes, it is.

The Court: How many ounces is that?

A. Four.

* * * * *

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: I now show you, Mr. Rolley, a carton, bottle and contents of the bottle of a somewhat yellower than clear color, and ask you if you can identify that?

A. Yes, this is the bath oil in Voodoo fragrance.

Q. This was the form in which you sell the product under the name Voodoo, is that right?

A. Yes. [146]

* * * * *

Mr. Hutchinson: Q. The exhibits you have just examined, Mr. Rolley, are the type of product you have been selling throughout the years, as you have described, under the name Voodoo, is that correct?

A. Yes.

Q. And they have been packaged more or less in this manner, and labeled "Rolley" in the manner here indicated ever since you have started making and selling it? [148]

A. In the very beginning we didn't use containers. We sold the bottle without the carton, then later on we boxed them.

Q. In other words, you were labeling these, attached the labels to your own containers in your own shop? A. That is right.

Q. And that has been true ever since you started? A. Yes.

Q. Now, referring to your sales at wholesale after you commenced the wholesale of your product, Mr. Rolley, before you sold your rights to the company and since, did you have orders which you received and billings and that sort of thing, shipping documents of one sort and another?

(Testimony of Charles A. Rolley.)

A. Prior to the incorporation?

Q. Yes. A. Yes, sir.

Q. And since that time the company has had, is that true? A. Yes, sir.

Q. I show you here a number of items which I take to be of that nature, and ask you if you can identify the exhibit. Counsel has examined the same. First, some materials bearing the year 1943. While counsel is examining those documents, Mr. Rolley, in your billings did you frequently use numbers for all your products?

A. In billing wholesale we invariably used the stock number. [149]

Q. And that number is the number you used for your inventory and identifying the product all the way through your operation, is that true?

A. Yes.

Q. Some of the billings here would bear those numbers in addition, and sometimes without the addition of a name? A. That is right.

Q. Did you have any number which identified the Voodoo product? A. No. 54.

Q. Has that been consistent from the beginning?

A. Yes.

A. The pending question was, Mr. Rolley, whether you could identify these materials which I gave you, or which I now show you, as being examples of billings or orders or both during the year 1943, which I take it would be your individual business?

A. Yes, these are copies of invoices that we made

(Testimony of Charles A. Rolley.)

out at the time we shipped to the various concerns these various perfumes.

Q. I note that there are some notations of one sort and another, apparently adding machine tapes, memorandum of one kind and another. Those did not relate specifically to the order or billing, but were inter-office notations?

A. That is right. That is just our file. I found them in [150] the files.

Mr. Hutchinson: At this time, if the Court please, I will remove, and counsel may examine, as I remove them, some rough notes that appear to be of that nature; and offer as defendant's exhibit next in order this collection of such billings bearing the year date 1943. I think it might be as convenient as any other way to leave these in the volume, your Honor, to avoid confusing them.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit X admitted and filed in evidence.

(Volume of billings dated 1943 received in evidence and marked Defendant's Exhibit X.)

Mr. Hutchinson: Q. I show you now a volume containing a number of similar items bearing the year date 1944, consisting of orders received from other firms, and your billings of the same general nature, and ask you to identify them?

A. Well, these are original orders made out by purchasers from Portland, Oregon, and Honolulu and various other places; also copies of invoices

(Testimony of Charles A. Rolley.)

made out by Rolley when we shipped the merchandise to them.

Q. Those are business records of your company for the year 1944, is that correct?

A. Yes. They were taken out of our file.

Mr. McKnight: Your Honor, a great mass of this has to [151] with products other than those which are involved in this case, and I presume you are limiting your questions to No. 54, which is the numerical counterpart for Voodoo, is that correct?

Mr. Hutchinson: I am limiting them to Voodoo, which appears frequently, and 54.

Mr. McKnight: 54 is the number which means Voodoo to customers. The rest of them we object to as incompetent, irrelevant and immaterial.

Mr. Hutchinson: We are not suggesting they relate to other products and material, but we know no other way to do it.

The Court: Limited to No. 54?

Mr. Hutchinson: Yes, No. 54 and Voodoo, your Honor.

* * * * *

Mr. Hutchinson: Q. Before leaving the year 1944, you also had correspondence in which you referred to the product Voodoo, did you not, that is, your product sold as Voodoo? A. Yes.

Q. Did you at various times put out this type of price list that you have indicated? [152]

A. Yes.

Q. I show you one here that does not bear a date,

(Testimony of Charles A. Rolley.)

and ask if you if it was used by you and, if so, when; that is, you or your company?

Mr. McKnight: Your Honor, I think it should be tied down as to date, if we can.

Mr. Hutchinson: I am asking if he used it, and I will narrow the focus, counsel?

A. We used it, and I can't be sure of the exact time when we used this, because we have had several printings of price lists. But it states here, "108 Geary Street," so that was in 1943. The sales tax is 21½ per cent, and that naturally was prior to the time the State raised the sales tax. So, due to the address on here, I would say it is 1943.

* * * * *

Mr. Hutchinson: Q. I show you a file dealing with 1945, [153] which purports to contain copies of billings, orders, and the like, of a similar nature to those earlier shown you, and I will ask you if those are of the same type and relate to the same subject with regard to the year 1945?

A. Yes, they are. [154]

* * * * *

Mr. Hutchinson: Q. Mr. Rolley, I show you what purports to be a billing invoice to K. P. Hunn, I believe is the name, March 18, 1947, and ask you if you can identify that?

A. Yes. That is a copy of our invoice to them.

Q. Your office copy? A. Yes.

Q. There are no names listed there. Under stock number I notice some numbers. Can you identify those relating to Voodoo?

(Testimony of Charles A. Rolley.)

A. No. 54-P, meaning "perfume," and wherever you see a "P" means perfume and "C" means cologne.

Q. 54-P— A. Would be Voodoo.

Q. Shipped at those prices on that date to the Sacramento purchasers, is that right?

A. That is right. [160]

* * * * *

Mr. Hutchinson: Q. I show you a letter on "Washington Office, Inc.," stationery, February 17, 1950, purportedly signed by M. B. Studebaker, and ask if you can identify that?

A. Yes. That is a letter I got ordering a bottle of Voodoo perfume from Mrs. Studebaker at that time.

Q. Was that order filled?

A. Yes, it was. It is noted on the top corner.

Q. Some pencil handwriting in the upper left hand corner?

A. Yes. That is our notation so that we know it is done. It says "Filled", date and my initial.

Q. 2/25/50. Is that the date you filled the order?

A. That is right.

* * * * *

Q. Have you examined your records to see how far back your copies of orders and other correspondence on the subject of labels goes?

A. As far back as we can get a record is, I believe, 1943.

Q. I show you a carbon copy of a letter dated June 10, 1944, addressed to the McCoy Label Com-

(Testimony of Charles A. Rolley.)

pany, San Francisco, and ask you if you can identify that document?

A. That is a carbon copy of an order we gave them on that date.

Q. Does that make any reference to Voodoo labels?

A. Yes. It specifies 500 Voodoo labels. [162]

* * * * *

Mr. Hutchinson: Q. I show you a letter addressed to Frederick Biermann, New York City, August 7, 1944, carbon copy apparently thereof, not signed, and ask you if you can identify that document?

A. Yes. That is a carbon copy of an order we placed with this company for blotters that we used for advertising purposes, and it shows 3000—pardon me, let's see—shows 3000 Voodoo blotters. We used to perfume these and give them out for advertising purposes. [163]

* * * * *

Mr. Hutchinson: Q. I show you, Mr. Rolley, two boxes containing, I believe, labels and ask you if you can identify those? I will open up one of these, if I may. One of these, I believe has been opened, and the other one not. I will ask you to state, if you can, what the boxes contain with respect to labels?

A. Well, they contain labels for Voodoo that we use on all our Voodoo products—perfume, cologne, and the various sundries. This is just—well, you opened this one. Well, I guess that is it.

(Testimony of Charles A. Rolley.)

Q. These contain approximately 1350 numbers, is that correct? A. Each.

Q. Each box?

A. I believe we ordered about 5000 the last time.

* * * * * [164]

Mr. Hutchinson: You may cross examine.

Cross Examination

* * * * *

Q. Were you born in San Francisco?

A. No, I was born in Pennsylvania.

Q. When were you in the shoe dyeing business in San Francisco?

A. From, it was either late 1930 or early 1931 that I started.

Q. Until when? A. Until 1943.

Q. And what did that business consist of? What kind of products did you make or sell?

A. In connection with the dye business?

Q. Yes.

A. Well, we sold—in that particular business we weren't really selling anything, excepting I had a separate room, [165] separate place for perfumes, and my primary business relating to the dye works was the cleaning and dyeing of shoes, bags, gloves, suede garments, and evening slippers, things like that.

Q. So that in 1930 you were making your living in the dyeing business, is that correct?

A. No, in 1930 I was working as a shoe salesman at that time. I at one time had been the manager,

(Testimony of Charles A. Rolley.)

but then, well, when the depression started things got a little rough, so I took whatever kind of job I could get.

Q. Well, when did you begin the shoe dye business here, then?

A. As I say, it was either the latter part of 1930 or early part of 1931. I don't recall the exact date.

Q. From the latter part of 1930 or early part of 1931 up until 1942 you made your living in the shoe dye business, is that correct?

A. No, I didn't make my entire living from it, no.

Q. Made part of it?

A. I made part of my living in that.

Q. The major part of it?

A. In the beginning, yes; then later on I made as much money selling perfumes, then later I made more money selling perfumes, and when I got to that point I gave up the dye business.

Q. At what time did you begin to make more money in the [166] perfume business than in the dye business?

A. That would be pretty hard to answer that question.

Q. Well, you should know that, Mr. Rolley?

A. I really couldn't say. I made more at one time, that is all.

Q. Didn't you file an income tax during that period?

A. Yes, but I didn't specify from whether I made it from selling perfume or from dyeing.

(Testimony of Charles A. Rolley.)

Q. You didn't specify the source of your income in your income tax return?

A. Certainly, but not breakdown from which phase of it. I worked in the shipyards during the war a whole year nights, so I had three things, so I can't tell you from which I made more money. In fact, I used to sell perfume in the shipyard.

Q. Sold them reproductions?

A. I sold them perfumes.

Q. Did you also sell them reproductions of perfumes?

Mr. Hutchinson: Just a minute, I think we will have to object to any reference to reproductions in that sense. You can define it to the witness.

The Court: Reproductions? What does that spell out?

Mr. McKnight: It spells out copies to me. When this gentleman testified in his deposition——

The Court: Ask him the direct question so that there is [167] no doubt about it.

Mr. McKnight: Q. Did you sell copies of other well known perfumes while you were at the shipyards? A. I perhaps did.

Q. Well, did you or did you not, Mr. Rolley?

A. I am pretty sure I did.

Q. Reproductions or copies of what well known perfumes?

A. I don't remember the individual ones at this time. Possibly Shalimar, probably Chanel No. 5. Same thing that all department stores in the United States do. Same thing many of the big perfume

(Testimony of Charles A. Rolley.)

manufacturers do, and still do today. Same thing. You can go into the Emporium right today and have Coty, who are one of the two biggest perfume manufacturers in the world, will sell you or anybody else their interpretation or version of some other perfume. I did no more than the biggest, most honorable perfume makers in the world did and still do.

Q. And you didn't use the names of other well known trademarks?

A. I never used the names of other well known trademarks on a box in my life.

Q. But you did use the names orally?

A. Pardon?

Q. But you did use the names orally?

A. I perhaps did, the same way practically every perfume [168] sales lady in the United States has always and still does, and will do right today down in any of your better stores.

Mr. McKnight: Your Honor, I think this witness should confine himself to what he did and not what anybody else did.

The Court: Limit it to what you did.

A. Yes, your Honor.

Mr. McKnight: Q. You can't tell us at what time you first began to make money in the perfume business, more than the dye business, approximately the year?

A. Well, I would say it would start running equal, oh, about the late 30's or so, and stayed more or less equal. I mean, like in the business, it is seasonal, sometimes more money in the dye works, like

(Testimony of Charles A. Rolley.)

before the opera season I would make more money dyeing evening slippers, then at Christmas time I would make considerably more money selling perfume than in the dye works.

Q. You referred to a Mr. Moreland. How do you spell that? A. M-o-r-e-l-a-n-d.

Q. What is his first name? A. Walter.

Q. What is his address?

A. I don't know his address without looking. In the phone book it is 600 something Post Street. I don't know his personal address. He is with the Florasynth Laboratories here in San Francisco.

Q. He was with the Florasynthe Laboratories at that time?

A. Not at that time. He is with them at this time.

Q. What was he doing then?

A. He was selling for some chemical concern.

Q. What perfume supply house did you first deal with in obtaining your supplies for your perfumes?

A. I got a great deal of my things from van Ameringen HaeBler in New York.

Q. What is the address of that concern, the last one? Is it in San Francisco?

A. No, New York.

Q. Are you dealing with them now?

A. Oh, yes.

Q. Is that the source of your perfume oils and other supplies?

A. They are just one of the concerns.

Q. What is the address of this concern in San

(Testimony of Charles A. Rolley.)

Francisco from which you first purchased supplies?

A. May I ask the young lady down there? I think she will remember.

Q. Certainly.

The Witness: Do you know van Amerigen Haebler's address? It is 57th Street. Do you know the number. That is, it is on 57th Street in New York. I am not sure of the exact number?

Q. I thought you said somewhere you dealt with a concern [170] called Butcher's in San Francisco?

A. Oh, that is in San Francisco. They are jobbing. That is where I first dealt with them. They don't sell perfume oils here. They are merely a representative.

Q. Did you purchase supplies from a jobber?

A. At that time?

Q. Yes. A. Through the jobber.

Q. Through the Butcher's concern?

A. Yes, and I obtained a lot of materials from them they had on hand at that time.

Q. What kind of materials did you buy?

A. Perfume oils. Essential oils.

Q. Will you explain to the Court what you mean by a reproduction of other well known perfumes?

A. By a reproduction of other well know perfumes I mean a fragrance that I interpret according to my own sense of smell and match it to the best of my ability according to my own sense of smell.

Q. Would you say people would come to you and ask you to make your interpretation of Shalimar?

(Testimony of Charles A. Rolley.)

A. They did that at one time. We don't go into that any more and haven't for years.

Q. But at one time you did duplicate any well known trademarked perfume, is that right? [171]

A. You bring me a bottle of perfume in a plain bottle, I wouldn't know the name of it.

Q. They didn't do that, did they?

A. Sometimes.

Q. Did they say it was a famous name?

A. Sometimes, and sometimes merely bring in the almost empty bottle.

Q. Give me the name and address of any person who ever brought in a plain bottle and asked you to duplicate it, forgetting the name?

A. I couldn't tell you the name and address of one that brought me a bottle with the name on it. That is going back a good many years. That would be impossible for me to remember at this time.

Q. Would you say that these perfumes, so-called reproductions, were intended as copies of other well know perfumes?

A. In a great many cases, yes.

Q. Didn't these well known perfumes have famous trademarks? A. Yes.

Q. And the people wanted perfumes that had the most famous trademarks, didn't they?

A. They wouldn't have come to me if they had. They could have gone to Magnin's and bought them, or any other store. I never once in my life ever misrepresented to a customer anything I did or sold.

Q. But you put out a list of famous perfumes

(Testimony of Charles A. Rolley.)

with the names of well known trademarks on that lists, didn't you? A. That is correct.

Q. I show you Exhibit 1, and ask you if that is a list put out by you? A. Yes, it is.

Q. Has names of famous trademarks on there, doesn't it?

A. No, not to my knowledge at that time it didn't, not a one.

Q. You do see the words "Rolley Reproductions" up there? A. Oh, yes.

Q. And those perfumes constituted a large portion of your business at that time?

A. No, sir. I would say in the late 30's I started to concentrate on my own individual creations, and the largest portion of my business in perfumes since some time around 1940 has been around True Daphne which is an original creation of mine, and is my biggest selling perfume and which I am told three or four of the large perfume companies have tried to copy.

Q. Until 1940, however, your main business was in the reproduction of perfumes or best sellers of other concerns, wasn't it?

A. No, sir, I didn't say that.

Q. That is the fact, isn't it? [173]

A. No, it isn't the fact.

Q. Did you ever copy Tabu perfume?

A. I have copied Tabu. I have copied about 200 different perfumes in my experiments.

Q. Did you ever have anybody come to you with

(Testimony of Charles A. Rolley.)

Tabu perfume and ask you to make a reproduction of it? A. No, sir.

Q. But you have copied it?

A. I have copied about 200 different perfumes in my experiments.

Q. This Meiers & Frank in Portland, Oregon, did you have a demonstration booth there at one time? A. Yes, sir, we did.

Q. What time?

A. I don't recall off handed whether it was late—no, it was early 1944, I believe, we started there.

Q. And were you selling reproductions at that time?

A. As reproductions, no, sir.

Q. As a matter of fact, weren't you asked to remove your demonstration booth from Meier & Frank's store because you were selling reproductions of well known famous perfumes?

A. That is absolutely untrue; and if I may say so, I believe you know it is untrue.

Q. Did the Toilet Goods Association attorney come to you and ask you to discontinue the sale of reproductions of well [164] known and famous trademarks perfumes?

A. I don't know whether the Toilet Goods Association or who it was. At one time in 1943 it was Mr. Brown, who was District Attorney, I went down to his office. Some attorney asked me to come down there and I did, and that—Mr. Brown and some of these attorneys questioned me, and they asked me why I was doing this, and I told them I had gone

(Testimony of Charles A. Rolley.)

to the Federal Building here and asked them all about labels, I thought that was the procedure, I didn't want to do anything wrong, and the Federal Government told me what I was doing was perfectly all right, so far as they were concerned, as long as I didn't make any untruthful statement.

I explained that, and Mr. Brown told me about three or four months before there had been a new amendment passed that made it illegal to use comparisons like I was doing, that is, to refer to any other name on a printed sheet of paper; and that prior to that time it was all right, but inasmuch as there had been the new law only three or four months, he could understand why I wouldn't be aware of it, and asked me what I intended to do about it, and I told them, "I will do whatever is right."

They asked me to destroy or get rid of those particular copies of papers you have had in evidence here, and they wanted me to do it in 24 hours. I asked them if they would please give me at least one week, and they agreed to that, and in one [175] week we had complied with the request 100 per cent, and since that time I have never had the slightest difficulty with anyone. In fact, I was invited to become a member of the Toilet Goods Association.

Q. That was in 1943 you had that conference with the United States District Attorney here?

A. No, San Francisco City Attorney. City and County Attorney General.

(Testimony of Charles A. Rolley.)

Q. Did he tell you that was a state trademark violation? A. No, sir, he did not.

Q. What did he tell you or advise you?

A. He told me about two or three months before they had passed this amendment in the State of California and that it was referred to as—now,—then referred to as Unfair Business Practice, if that is the correct word.

Q. Did you receive any notice from any other attorney or have any conference with attorneys for any perfume concerns prior to that time?

A. No, sir.

Q. Hadn't you been warned by another concern not to use their trademark? A. Never.

Q. How did you happen to go to Mr. Brown's office?

A. I got a subpoena from the Food & Drug of the State of California through—not the Attorney General, the District [176] Attorney.

Q. Up until 1943, then, you had used names of famous perfumes on lists?

A. On lists only.

Q. In connection with the sale of your perfumes, is that correct?

A. That is correct. I admit that.

Q. And did you use the trademarks of plaintiff in that list?

A. You mean—by the plaintiff—

Q. Did you use a trademark "Forbidden" in any way?

A. I don't know. Never has "Forbidden." I

(Testimony of Charles A. Rolley.)

don't admit here that is a property of Dana, Inc. I never used the word "Tabu" in my life.

Q. Did you use the word "Forbidden" in any conjunction?

A. I used the words "Forbidden Flame," yes.

Q. And you used that in connection with the sale of perfumes of yours?

A. That is right, and I believe that was long before "Forbidden" was ever registered or used in connection with the Tabu perfume.

Q. That Forbidden Flame wasn't a perfume you acquired from the predecessor? A. No.

Q. It was your own perfume?

A. That is correct. [177]

Q. So that you didn't stop using the names of famous trademarks of other companies until 1943, is that correct?

Mr. Hutchinson: I don't think that is the evidence. We object on the ground that it is argumentative.

The Court: Develop the facts, whatever they may be. That question is too general.

Mr. McKnight: Q. So that until 1943 you used a list in which the names of famous perfumes appear, is that correct? A. That is right.

Q. And you stopped that in 1943?

A. That is right.

Q. What was Forbidden Flame a copy of, what perfume? A. Tou Jours Moi.

Q. As a matter of fact, it was a copy of Tabu, wasn't it? A. That is false.

Q. You testified on your discovery deposition

(Testimony of Charles A. Rolley.)

that Forbidden Flame had an oriental fragrance, did you not? A. Yes.

Q. A strong fragrance? A. Yes.

Q. And it is well known that Tabu has a strong, oriental fragrance?

A. Oh, yes, but there are dozen of them have strong oriental fragrances, and they are no more alike than, well, red pepper and—and salt. [178]

Q. They are alike in that both are oriental and both are strong, aren't they?

A. That is correct, but there are dozens and dozens of heavy oriental perfumes on the market and still none could be construed as being alike. It is like saying—

Q. (Interposing) Do you mean to tell me Tou Jouis Moi is a heavy oriental fragrance?

A. I consider it heavier than Tabu.

Q. As a matter of fact, it is a floral fragrance, isn't it?

A. As a matter of fact, it isn't a floral fragrance. It hasn't the slightest relation with floral. It is one of the heaviest perfumes ever put on the market.

Q. Who bought Forever perfume from you in 1934?

A. Oh, I don't know who bought Forever perfume from me in 1934.

Q. 1935? A. No, I wouldn't.

Q. 1936? A. I don't remember, sir.

Q. Can you give me the name of anyone who bought Forever perfume from you in the '30's?

(Testimony of Charles A. Rolley.)

A. No, sir, I can't at this time.

Q. Can you tell me anyone who bought Garden Pink perfume from you in the '30s, any purchaser at all?

A. Not offhanded, no, sir. [179]

Q. You certainly would remember the names of your early purchasers, shouldn't you?

A. No, sir, I could not. After all——

Q. (Interposing) Wouldn't you say I should remember the names of my first clients?

A. That, I think, is a little different. I can remember Mrs. Coffey, as I mentioned before, very well, because she came in many, many times, and there are a good many reasons. I can't even remember off-handed the first employee I hired in the business. I am sorry, I can't.

Q. Can you give us the name of anyone who bought Red Red Rose perfume from you in the '30's?

A. Yes, sir, I can remember that.

Q. Without referring to any information, suppose you give it to us orally?

A. Well, she has been married three times since, and I forgot her name yesterday. Her first name is Vera.

Q. That is the lady in Sacramento?

A. Yes.

Q. Was she connected with the Merle Norman Studio?

A. No.

Q. Ever been?

A. No, sir.

Q. Did she ever purchase from you to resell?

A. No, sir. [180]

Q. The only people that you have told us about

(Testimony of Charles A. Rolley.)

that bought Voodoo perfume or cologne from you prior to 1945 are Mrs. Coffey and another woman whose name you only recall as a first name?

A. I can tell you more now.

Q. But you couldn't tell us any more on direct examination? Those were the only ones?

A. At that time that is all I could, because when I went down there for this deposition I wasn't prepared, didn't know what I was going to be asked, and I didn't know what records to look up.

The Court: Do you know now?

A. Yes, sir.

The Court: Tell us the names.

Mr. McKnight: Q. And addresses?

A. Well, I can't give you addresses. I will any time if you let me look in the book.

Q. No, I would like to have you testify orally.

A. Mrs. Wriggley. She bought in 1940 or so.

Q. Where was she from?

A. San Francisco. She is in the court room now.

Q. Who else? A. And a Mrs. Shaden.

Q. How did you happen to contact Mrs. Wriggley?

A. Well, people come into my shop and see my beautiful [181] shop now, and see all the advertising we are doing and just sort of take an interest and say, "I remember when you had this little dye shop upstairs, had your shoe store. I used to buy perfume from you then."

Since this happened over a year ago, whenever they started talking to me like that I would take

(Testimony of Charles A. Rolley.)

an interest, ask them, "How far back do you remember me and remember some of the things I had," or they bought from me. But prior to that time I had no interest, just customers being pleasant, and I saw no reason to go in and ask them where they lived, or their names and everything.

Q. Now, when you signed the answer to the Complaint in this case you signed it under oath, didn't you? A. Yes, sir.

Q. Mr. Rolley, I call you attention to the answer filed by your company in this case and ask you if that is your signature? A. Yes, it is.

Q. In this answer do you remember stating that you first used the trademark Voodoo on April 15, 1940? A. Would you repeat that, sir?

Mr. McKnight: Will you please read the question?

(Question read by the reporter.)

A. To the best of my ability, yes, sir, I remember answering that at that time that is as far back as my information went. [182] I hadn't searched any further.

Q. And you did state that under oath?

A. Oh, yes. Yes, that was the truth at that time.

Q. And in your discovery deposition—strike that. How did you fix April 15, 1940, as the date?

A. Because that is the only proof that I had in my own mind at that time, and I wasn't going to make a statement in that deposition under oath that I wasn't sure of at the time.

Q. And at that time you swore to that as the

(Testimony of Charles A. Rolley.)

truth, the whole truth, and nothing but the truth, isn't that a fact?

A. That is correct. That was the truth to the best of my knowledge at that time.

Q. And yet in your discovery deposition, which was taken some time—which was taken on October 9, 1950, you then stated you had first used the trademark Voodoo on perfume in 1938, isn't that correct?

A. Aren't you talking about the same thing, Mr. McKnight?

Q. No, the first paper I showed you was the answer which you filed in this case.

The Court: The attorneys filed the pleadings in this case. Now he is talking about a deposition.

A. Oh, oh, I see.

Mr. Hutchinson: Can you give us the reference, counsel?

The Court: Page?

Mr. McKnight: Q. On pages 20 and 21 didn't you [183] originally testify when asked, "Now, when did you first use the trademark Voodoo on or in connection with perfume or colognes," didn't you testify "Some time in 1938"?

A. May I ask what the date of that was and the date of this?

Q. Mr. Rolley, I call your attention to the answer which you filed in this case, and ask you what date is shown there by the Notary?

A. June, 1950.

(Testimony of Charles A. Rolley.)

Q. And that is your signature at that time, is it?
A. Yes, sir.

The Court: Now indicate the date of the deposition.

Mr. McKnight: Q. Now, the date that you gave your deposition was the 9th of October, 1950, wasn't it?
A. That is correct, sir.

Q. Between June, when you signed the answer, and October, when you gave your deposition you had talked with your counsel, hadn't you?

A. Oh, yes.

Q. And you had seen the trademark registration of the plaintiff for Voodoo?
A. Yes, sir.

Q. At the time that you gave your answer in this case in June, had you seen the registration of Voodoo of the plaintiff?
A. No, sir.

Q. But after you had signed your answer, you then saw the [184] registration?
A. Yes, sir.

Q. And before the time that you testified in your discovery deposition?
A. Yes, sir.

Q. Does that explain why you stated that you had used Voodoo in one instance in 1940 and in the later time in 1938?

A. Do you want me to explain that?

Q. I want you to answer the question.

The Court: Answer the question, then you may explain it.

A. I don't know just——

The Court: Read the question.

(Question read by reporter.)

(Testimony of Charles A. Rolley.)

A. It is hard for me to answer the question. It is like asking when I stopped beating my wife. I would have to explain it in order to answer it.

Mr. McKnight: Weren't you trying to get ahead of the date of registration?

A. Why, certainly. May I explain it now?

Q. As a matter of fact, didn't you tell the truth——

The Court: Your attorney will develop it.

A. I am sorry.

Mr. McKnight: Q. As a matter of fact, didn't you tell the truth the first time, when you signed the answer under oath [185] and you alleged the date you first used Voodoo was 1940?

A. To the best of my knowledge, that was as far back as my knowledge went at that time. I made further investigation afterwards. In fact, only two weeks ago I got further information and further proof, and documentary proof, that would refresh my memory, that would take me further back.

Q. When you signed the deposition, you then alleged that you had first used the trademark Voodoo on perfume in 1933, isn't that correct?

A. Yes, sir. Well——

Mr. Hutchinson: 1935.

A. Whatever it says there.

Mr. McKnight: 1935?

Mr. Hutchinson: Page 21.

Mr. McKnight: Q. Page 21, you allege the date 1935.

Mr. Hutchinson: Counsel, I think it is only fair

(Testimony of Charles A. Rolley.)

if you show the witness what you were asking, and ask if he stated that.

Mr. McKnight: This is cross examination.

Mr. Hutchinson. I know.

Mr. McKnight: This is his own product. He should know as well as I know the addresses of my clients.

Mr. Hutchinson: If the Court please, we will have to object to the pending question and others like it on the ground no proper cross examination. This apparently is [186] intended as impeachment, and it is required the witness be shown what he is claimed to have said at another time.

The Court: You may show him the deposition and cross examine him on it.

Mr. McKnight: Q. When you signed the deposition did you state that you had first used Voodoo in 1935 and possibly 1936, as shown on page 30 (handing document to witness)?

A. Yes, that is right.

Q. So that you first come out and say you used Voodoo in 1940 in a sworn answer. You then give a deposition in which you allege 1938, and then when you go to sign the deposition you date it again back to 1935 or 1934, is that all true?

A. That is true.

Q. The reason you keep dating back, to help you in every way you possibly can?

Mr. Hutchinson: We object on the ground that is entirely argumentative, your Honor.

The Court: Objection sustained.

(Testimony of Charles A. Rolley.)

Mr. McKnight: Q. In your discovery deposition, on page 21, which I will show you, didn't you first state under oath you went into the perfume business in the early part of 1938?

A. No, I signed 1933.

Q. But you testified 1938, didn't you?

A. That is what I thought at the time, and subsequently I [187] was able to go back and prove positively the earlier date.

Q. You made a mistake of five years?

A. That is very possible. That is very possible.

You see——

Q. (Interposing) The perfume business was very important to you, wasn't it, and has been?

A. Everything at that time was very important to me.

Q. But you said 1938? It wasn't a matter of surprise, was it, at the time the question was asked?

A. At the time that is as far as my memory went. You see, I never thought it was necessary at all to go beyond, actually, 1948, so I didn't make much effort to go beyond that because your first use, or, your client's first use for naming a perfume, use of the word Voodoo, was in 1948.

Q. You don't know that as a matter of fact, do you? A. That is all they offered me.

Q. You don't know that, do you?

A. That is all they offered me, and I accepted your word.

Q. Didn't you see the date of the registration?

A. I didn't see it until some time later. Up

(Testimony of Charles A. Rolley.)

until that time I merely accepted your word completely. You were going to settle this thing to my entire satisfaction. You even advised me not to see an attorney, until I got so confused by the continuous correspondence, I got frightened that you were trying to make, as many people told me, a sucker out of me. [188]

Q. Who told you that?

A. Many people in the industry.

Q. Name one in the industry?

A. Why should I implicate them?

Q. You are testifying under oath. Back up that statement and give me the name and address of anybody that made that statement or withdraw that.

Mr. Hutchinson: That is not a proper question.

Mr. McKnight: It is—making a gratuitous statement like that, then when comes cross examination, he hides.

Mr. Hutchinson: We have tried, if the Court please, to let this interrogation go on without objection because this witness is a key witness for the cross complainant as well as the defendant, but we think there is some limit, and this is so highly argumentative I think counsel should be instructed to query the witness as to the facts.

Mr. McKnight: I think the argumentativeness has come from the gratuitous, voluntary statement of the witness.

The Court: We will have to label it as gossip, anyway.

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: Move to strike it, if it isn't responsive.

Mr. McKnight: I don't think it should be stricken. That should be in the record for the Court to see and remember, and for what it is worth to show the character of this witness.

Q. Now, then, I want to call your attention to Plaintiff's Exhibit 86 and ask you if that is the product of the defendant? [189]

A. Yes. If I remember right, you bought this in my shop.

Q. Does it bear the trademark Voodoo on the bottle? A. Yes, sir, it does.

Q. Did you sell any Voodoo perfume or cologne outside of San Francisco prior to 1940?

A. Not prior to 1943 except perhaps mail orders, that is, retail mail orders.

Q. But you don't have any record of any sales of Voodoo perfume or cologne outside of San Francisco prior to 1943? A. No, sir.

Q. I call your attention to a document, which I would like to have the Clerk mark for identification Plaintiff's Exhibit 101.

(Document was marked Plaintiff's Exhibit No. 101 for identification.)

Mr. McKnight: (Continuing) Q. And ask you if the advertisement in the lower left-hand corner is your advertisement?

A. Yes, sir, it is.

Q. That is the advertisement of the defendant?

(Testimony of Charles A. Rolley.)

A. Yes, sir.

Q. And is Voodoo perfume advertised there?

A. Yes, sir.

Q. You offered to give away a sample free, don't you, in that advertisement? [190]

A. We offered to give it in conjunction with the purchase of another product, a small sample bottle.

Q. In other words, you are advertising?—

A. Sea and Ski Hand Cream.

Q. And with that for a dollar you gave a jar of this Sea and Ski Hand Cream and also gave free a bottle of Voodoo?

A. Well, your wording is confusing.

The Court: Read it.

A. We don't give the hand cream. We sell the hand cream.

Mr. McKnight: Q. And in addition to that—?

A. With the hand cream comes a small bottle of Voodoo perfume. The purpose, we are trying to increase or introduce the new hand cream and get as wide a market as possible on it.

Q. Does that indicate your Voodoo perfume is a poor seller? A. Not necessarily, no.

Q. Have you ever done any advertising of Voodoo perfume in San Francisco papers outside of this?

A. I may have a number of years ago, but not for quite some time.

Q. This ad appeared in the San Francisco Chronicle September 27, 1951, is that correct?

(Testimony of Charles A. Rolley.)

A. That is correct.

Q. You don't have any other advertisements of Voodoo perfume or colognes here at present this morning, do you?

A. Just duplicates of the same ad. [191]

Q. But you had—what was that ad you say you had in Vogue? A. That wasn't Voodoo.

Q. What was it?

A. You didn't ask me that, sir. You asked me if we advertised in national magazines.

Q. I thought you had an advertisement of Voodoo in Vogue Magazine?

A. No, sir, we just advertised perfume in general, and asked me did I ever have any. You didn't specify fragrance.

Q. Outside of this ad, Exhibit 101, this morning, you have no other ads of Voodoo perfume?

A. No, sir.

The Court: Pass that up, Mr. Clerk.

Mr. McKnight: I offer in evidence Exhibit 101.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 101 admitted and filed in evidence.

(Advertisement Sept. 27, 1951, was received in evidence and marked Plaintiff's Exhibit 101.)

Mr. McKnight: Q. What is the extent of your sales for Voodoo perfume for this year?

A. We don't keep records of the sales of every individual perfume. We break down our sales as

(Testimony of Charles A. Rolley.)

perfumes and colognes is one item, as cosmetics is another item, gift taxable, gift non-taxable. [192]

Q. Have you any idea of the total sales of your Voodoo perfume and cologne since the date you first started selling it up to present?

A. No, I would have no idea.

Q. Would it be \$1000?

A. It would be in excess of that.

Q. Would it be \$100,000?

A. Oh, no, it would be under a thousand—

Q. Would it be under \$25,000?

A. Now, I don't know.

Q. Would it be under \$50,000?

A. In Voodoo alone?

Q. Yes. A. Oh, yes, it probably would be.

Q. Would it be somewhere between twenty-five and fifty thousand then, is that right?

A. I would only be going by conjecture. I would say yes, but I wouldn't want to be held down to a figure on it.

Q. Are you including the trademark Voodoo in your current price lists of Rolley, Inc.?

A. Pardon?

Mr. McKnight: Will you read that, Mr. Reporter?

(Question read by reporter.)

A. The printer now has an order for new price lists which I have been withholding for about a year, and it specifies Voodoo on it. [193]

Q. How long has your price list been out on which Voodoo has not appeared?

(Testimony of Charles A. Rolley.)

A. You mean how long has it been——

Q. Since you had a price list that had Voodoo listed on it?

A. Oh, sometime within the last, approximately within the last two years.

Q. So that the last two years Voodoo has not appeared on the price list of the defendant?

A. I would not say for the last two years. I say some time within the last two years. I don't know the exact time. I wouldn't sit down and say two years. It might be one and a half or—but it isn't in excess of two years.

Q. Why did you omit the trademark Voodoo from your price list?

Mr. Hutchinson: If the Court please, I think we are wandering far afield, and it is highly repetitious, so at this time I would like to object on the ground this question and others like it are incompetent, irrelevant and immaterial, and outside the issues of this case. I found nothing in the pleadings to suggest that these people have purchased the right here, or that there is any abandonment of anything, or anything of that nature, no allegation of that sort. I cannot imagine why we have to go through all the price lists published in the last two or three years.

Mr. McKnight: I am curious to find out. These people came [194] here with price lists and introduced some of them in evidence, and the price lists for the last year, I would say, two years, do not

(Testimony of Charles A. Rolley.)

include the trademark Voodoo, and I am curious to ascertain why.

The Court: How does that enter into the merits of this case?

Mr. McKnight: I think it is important to show they have no interest in the trademark, and I think it is an indication of abandonment. I don't think they have made any sales in the last two years.

Mr. Hutchinson: Shows sales in 1950.

Mr. McKnight: Some evidence. I am curious—

The Court: Well, he may answer. Why haven't you embodied it in the price lists since that period?

A. The reason why, your Honor, is, one of the reasons is because we bring out new perfumes from time to time. This business is almost like, well, the style business and you, as we call it, sweeten it up once in awhile. If your list gets too long it is like, well, ads with too many words in it. If it is too wordy people won't read it at all. We try to eliminate certain words for a period of time.

And further explanation is for three years my firm was in a very bad financial position, and only until the last June have we come out of it, and we are now on a sound financial basis. I had to curtail a great many of my activities, [195] advertising and things, with the sole purpose of saving my business from bankruptcy, and we couldn't promote, we couldn't advertise all perfumes, so we concentrated our efforts on those which brought us the quickest return.

(Testimony of Charles A. Rolley.)

Anyone in the perfume business knows that you can have a perfume lie dormant from an advertising point of view, then when you are in a position to spend money on it, go promote it.

Another thing, it is seasonal. Some perfumes are better in one season than another.

Mr. McKnight: Q. So you eliminated Voodoo because it was a poor seller, is that correct?

A. Voodoo and half a dozen other of my fragrances have been slow sellers. Whenever we do get one like that I try to find out the reason why. That doesn't mean we abandon the perfume, or anything. It merely means I will endeavor to make some improvement, if possible, in the particular perfume, and then, when I accomplish that, put it out. Like we put all the new perfumes——

Mr. McKnight: I think that is sufficient, your Honor.

A. Well——

Mr. McKnight: Let me have Exhibit B-1.

Q. I call your attention to Defendant's Exhibit B-1 and ask you if there is any date thereon?

A. No, sir. [196]

Q. The word Voodoo of course appears there at the bottom line in two instances, does it not?

A. It says at the top of the first page, "12 Voodoo," and at the bottom it says "6 Voodoo," and on the third page it says "6 Voodoo," and again on the bottom it says "12 Voodoo."

The Court: We will take a recess at this time.

(Short recess.)

(Testimony of Charles A. Rolley.)

Mr. McKnight: Q. Mr. Rolley, is there any date on Defendant's Exhibit Z?

A. No, there isn't.

Q. Who is Michele—M-i-c-h-e-l-e?

A. Well, my knowledge of a Michele was a young lady who opened up a perfume shop on Chestnut Street, and her own personal name was one that was not good for retail purposes. In fact, I gave her the name for her shop.

Q. Is she still in business?

A. I don't believe so.

Q. Do you know her present address?

A. No, sir. The last time I remember her was she sold the business on Chestnut Street and went into business over in Oakland in a shop there. Since then I believe she is out of that business, and I have no knowledge of what happened to her since.

Q. Was she a personal friend?

A. No, sir. She came to me as a stranger and asked to carry [197] our perfumes.

Q. What was her right name?

A. It is a long Italian name and I don't remember it at this time.

Q. Calling your attention to Defendant's Exhibit A-1, I will ask you whether a great many of these documents show goods returned?

A. From four firms it does.

Q. Were all the shipments of your products to concerns in San Francisco and concerns on the

(Testimony of Charles A. Rolley.)

Pacific Coast, except to Margery Bell in that Exhibit A-1? A. You mean in this?

Q. Yes.

Mr. Hutchinson: Counsel, would not the record speak for itself unless there is some matter of interpretation you would like to find out from the witness?

Mr. McKnight: I think it will shorten the record.

Mr. Hutchinson: I think the record should stand, unless there is some matter of interpretation.

Mr. McKnight: I think he can answer the question very simply.

The Court: What is the question?

Mr. McKnight: Q. Whether all shipments in Defendant's Exhibit A-1 were limited to the Pacific Coast except one order to a Margery Bell in Washington, D. C. [198]

A. That is correct. No, pardon me, Honolulu. There is a good substantial one here for Honolulu.

Q. Was Margery Bell in Washington, D. C., an agent of yours at the time you shipped that order to her?

A. No, sir. By an agent you mean a sales representative?

Q. Yes. A. No, sir, she wasn't.

Q. Calling your attention to Defendant's Exhibit X, are all the shipments in there to parties on the Pacific Coast?

A. No, there are some in here for Honolulu. In fact, there are several for Honolulu.

(Testimony of Charles A. Rolley.)

Q. Shipments were made, then, to the Pacific Coast and to Honolulu, is that correct?

A. In this group, yes.

Mr. Hutchinson: For what year is that?

Mr. McKnight: 1943.

Mr. McKnight: Q. Calling your attention to Defendant's Exhibit Y, are all shipments in this folder to parties in California and the Pacific Coast states?

A. Well, there is Oregon, Honolulu, San Francisco, San Jose, Sacramento. There is a copy of a letter herein pertaining to a mail order to Minneapolis, Minnesota.

Q. But it has nothing to do with Voodoo, does it?

A. It doesn't specify any particular fragrance.

Q. Do you have any record of purchase of labels prior to 1944? [199]

A. I don't recall whether it is 1943 or 1944, but not prior to 1943.

Q. How did you happen to pick the date April 15, 1940, as the date of the first use of Voodoo as alleged in your answer?

A. I thought at the time that that was approximately when I first started using it. That was my impression at the time. I made no effort to go any further back searching my records.

Q. That was purely your oral guess?

A. That is right.

Q. After you made your statement under oath

(Testimony of Charles A. Rolley.)

in your answer, you saw a copy of Plaintiff's Registration Voodoo.

Mr. Hutchinson: If the Court please, this has been asked and answered at least twice. I think we should not repeat it.

The Court: That is right.

Mr. McKnight. Q. On the perfumes that were sold to your friends, do those perfumes have any labels, the early shipments of perfume to your friends around Christmas?

A. I don't know understand the question. What do you mean by my friends?

Q. You said you sold some perfumes to some friends when you first went into the perfume business. Did those bottles have labels on them?

A. The first sales, the very first sales, had no labels at all. By that I mean the very first sales I ever made in my life had no labels on them at all.

Q. How did you happen to choose the trademark Voodoo?

A. Well, my wife and I would get together and try to think up names, and she suggested the name to me. Then she was employed at H. Liebes at the time, and she was floor manager there, and she knew more about the names of perfumes and things like that than I did, not only being in the retail business there, but being a woman.

Q. You used numbers in connection with your reproductions, did you? A. Yes, sir.

Q. What was "54" a reproduction of?

A. "54," as I answered repeatedly, was not a

(Testimony of Charles A. Rolley.)

reproduction. It is an original creation by myself, and it was unlike any other perfume, and not connected in any way with any other perfume.

Q. Have you always used that number in identifying Voodoo in your records?

A. Always, from the beginning; still do.

Q. And you made no search to determine whether or not Voodoo was the property, registered trademark, of any other concern before you used it?

A. I made a search in my own way at the time, yes, sir. I always did on any name we used.

Q. Your search consisted of looking around the stores? [201]

A. On my own part, yes. But, as I say, my wife was connected with H. Liebes & Company and she would go to the perfume buyer there, and they would go through some sort of a catalogue or book or record of title of various perfumes to see if any other company had been using it, and if we couldn't find it, I assumed it was all right to use it.

Q. You didn't go to an attorney and have a search made of the registered trademarks in the patent office, did you?

A. I didn't even know at that time that that was possible.

Q. Would you do that today? A. Oh, yes.

Mr. McKnight: That is all.

Redirect Examination

Mr. Hutchinson: Q. Mr. Rolley, at the time

(Testimony of Charles A. Rolley.)

you started and since has your company imitated any other perfume, or attempted to imitate any other perfume in the Voodoo preparations?

A. I don't understand your question.

Q. Well, I will put it this way: Is Voodoo product, the scent and fragrance as you prepared it and have sold it, as the company does since acquiring your rights in it, an attempted imitation or reproduction of any other representation of any other fragrance whatsoever?

A. No, sir, not in the slightest.

Q. Has it been your personal intention and that of the [202] company at any time to abandon the rights that you or the company had in the name Voodoo in connection with perfume and other preparations? A. No, never.

Q. Have you at any time since you commenced to sell Voodoo products personally, and subsequently on behalf of the company, destroyed your stock or deliberately placed yourself out of stock or products with the Voodoo fragrance and name?

A. We have never been out of stock of Voodoo perfume, no, nor have we ever been out of a label for it, or anything pertaining to it, since I first started using it.

Q. Prior to your entry into the wholesale work, and selling at your shop and store in 1943, as I recall, you kept only usual retail sales slips for records of your business, is that right?

A. That is correct. A sales tag.

(Testimony of Charles A. Rolley.)

Q. Those were destroyed from time to time, is that true?

A. We kept them for, I believe it was around five years, at least five years, and then after that, why, we no longer kept them because I don't know of any business that keeps them too long.

Q. Did you keep a diary or make any other attempt to amass information as to your customers who came in through the earlier years, up to date?

A. No, I didn't. [203]

Q. You didn't have any routine mailing to these retail customers before 1943?

A. No, we never kept a record of that or went into that until after the war. It was, well, physically impossible to do so prior to the war and during the war.

Q. Was your business on a cash basis as regards your customers while you were in the retail business?

A. Until the last three or four years all our retail business has been on a cash basis.

Q. In other words, customers took whatever they purchased and paid for them right at the time?

A. That is right.

Q. You therefore kept no charge account?

A. Not until the last three years or so.

Q. Approximately 1948 or thereabouts?

A. That is right. [204]

* * * * *

WALTER JAMES MORELAND

called as a witness for defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Walter James Moreland—M-o-r-e-l-a-n-d. I represent Florasynth Laboratories of New York.

Direct Examination

Mr. Hutchinson: Q. What is the nature of the business of the company for which you work?

A. Well, business of manufacture of essential oils and [205] aromatics chemicals.

Q. What do you mean by "essential oils," very briefly, in lay language?

A. Well, you buy clove spices, you buy cinnamon spices. The oils in that material is the essential oils. The same applies to any natural product which has an oil.

Q. Those are used for flavorings and perfume fragrances and the like, is that correct?

A. That is right.

Q. Are you acquainted with Mr. Rolley, who was on the stand just before you?

A. I have known Rolley for 20 years.

Q. You knew him, then, in 1933 and 1934 and thereabouts? A. That is right.

Q. Do you recall his being in any type of business at that time?

A. Well, when I first met Rolley I was with Carbide & Carbon Chemical Company, who were the main manufacturers of synthetic chemicals. The objective was to find every place that had any occa-

(Testimony of Walter James Moreland.)

sion to use any synthetic chemicals that were being developed. So I just walked into Mr. Rolley's place. He was dyeing some shoes, and I didn't know anything about dyeing shoes, and I soon found out he didn't know much about it either, and I figured if I could get some information that would help him out through our operation I would get a sale, [206] and that is the way I first met him.

Q. You were first acquainted with him as a representative of your then employer, and brought him products to use in his dye shop?

A. That is right.

Q. Subsequently, did you and he discuss the perfume business or cosmetic business?

A. First thing started was a cleansing cream, so-called. It happened Carbide & Carbon Company had come out with a new synthetic named Triethanolamine. Mr. Rolley was trying to make some kind of a cream, and so I showed him how to make us this cream using Triethanolamine and some other items Carbide & Carbon manufactured. It was to our interest, any market we could find that had occasion to use synthetics which Carbide & Carbon manufactured, that is what our business was.

Q. Did you subsequently discuss the use of scent or fragrance for that product?

A. Of course Carbide & Carbon had no interest in odors of any type. However, as far as this cream was concerned, I used to go to Rolley's house in the evening, and we would make this stuff up. As far as his wife and anybody who knew anything

(Testimony of Walter James Moreland.)

about it, they seemed to think it was all right. There was no odor, however; so I knew nothing whatsoever about odors, that wasn't our business, but naturally I was acquainted [207] with people in the field who were acquainted with that line of business, so I suggested to Mr. Rolley he should get in touch with Mr. Hildebrand of L. A. Butcher, who jobbed the van Ameringen Haebler line, and we got from Mr. Hildebrand some samples to put into this cream and try to get an odor that would be satisfactory.

Q. Mr. Rolley's place of business was on Stockton Street at that time, is that true?

A. At that time he was upstairs at Stockton and Geary. Used to be an Owl Drug Store downstairs.

Q. Subsequently were you about when Mr. Rolley had developed his own perfume?

A. Well, it was, I think, around Christmas time of the first year that I met Rolley, and just about the time of the banks all being closed. I remember at that time it was kind of hard getting money. Rolley was interested in making some perfume and giving some perfume to accounts of his from whom he used to get shoe dyeing business, that is, like Frank Warner and Sommer & Kaufmann and different stores who turned over shoe dyeing to him.

After we got him straightened out on the dyes there, he was doing a good business, and he wanted to give some of these accounts some bottles of perfume for Christmas. So, as I say, I knew nothing

(Testimony of Walter James Moreland.)

about the perfume end of it, but Hildebrand—in fact, he didn't know anything about it, [208] either, but we were able to get through Mr. Hildebrand, just as I got through Carbide & Carbon, deals on the perfumes, materials for making perfumes.

I remember this Owl Drug Store, Rolley was acquainted with somebody down there and he went down and got a bunch of bottles from them and made up the perfume, put it in the bottles, and that was the start of it.

Q. Do you remember the year 1933? When do you think that was?

A. Whatever year the banks were closed. I think **it was 1933.**

Mr. Hutchinson: I think we can take judicial notice of that, your Honor.

The Court: I think everyone thinks that.

Mr. Hutchinson: In the following year did you have any acquaintance with Mr. Rolley and his activities in the perfume business?

A. Oh, I have followed Rolley along off and on ever since; the past few years he has been in his own field and I have been in my field, so we haven't come in contact much. But at first there I was very much interested in pushing the business of Rolley as much as I could because, as I say, it was our business to sell synthetic chemicals, and the perfume end of it, we didn't enter into the picture on that end, but anything that would boost his entire business was to our advantage. [209]

Q. Do you recall those early days, 1933, 1934,

(Testimony of Walter James Moreland.)

1935, whether or not Mr. Rolley used any names in combination with particular perfumes he prepared?

A. That, of course, is a retail end of the business and there gets away from the production side. However, I know Rolley would ask me once in a while, "How do you think this name would be?" and I had no judgment on the thing, but some of the names he used were so ridiculous, so far as I was concerned, I couldn't understand anybody paying any attention to them. So that's the only knowledge I have of names is what he was talking about, so far as that is concerned.

Q. These names he suggested to you that sounded extreme or ridiculous, do you now recall any of those?

Mr. McKnight: Your Honor, I am going to object unless this is tied down to a time and place.

The Court: He may answer yes or no and then fix the date.

A. As I say, I first—when was it the banks closed, Judge, do you remember?

Mr. Hutchinson: I think we stipulated it was March, 1933.

The Court: 1933.

A. Well, it was the Christmas of 1933 that Rolley first started making up these perfumes. Then the following year, as long as he was there at Geary Street he didn't do any particular amount of business so far as the sale of perfume [210] was concerned.

(Testimony of Walter James Moreland.)

When he went from Geary and Stockton up to a location on Geary Street next to Nathan Dohrmann's, that is when he put in the room that—the room for perfumes.

Q. Do you recall the date of that in relation to 1933?

A. That must have been around 1935 or 1936, somewhere in that time.

Q. With reference to that period, say, 1935, 1936, earlier than that do you recall any particular name?

A. Yes. Like I say, when he first started making them, when he was making them up as gifts for accounts that he was getting business from, the idea was he couldn't very well give somebody a bottle of perfume with no name. So he had all these names he had worked up, and I remember one he used to call Red Red Rose. I never could understand the reason for the two "Reds," but that seemed to be O.K.

And it was about that time, I think, there was quite a lot of talk about some Voodooism down in Porto Rico, somewhere around in there, and so I remember he had the name "Voodoo," and I couldn't understand what the dickens relation the name "Voodoo" had to perfume but it wasn't any of my business. Rolley would ask me about these names and I would always tell him he was in the retail business, he knew more about those things than I did.

Q. Do you recall that was earlier than 1936?

(Testimony of Walter James Moreland.)

Mr. McKnight: That is objected to——

A. Oh, yes.

Mr. McKnight: ——as leading, your Honor. I think he should ask this man when these things took place?

A. This started—the first perfumes were made up at Christmas, 1933. Then about two years after that time, that must be about 1935 when he moved up on Geary Street and had more space for selling perfumes. Exactly what date that was, I don't know; but it wasn't very long after it started.

Mr. Hutchinson: Q. In other words, if I understand you, you fix the time when you remember the use of that name Voodoo at something like two years after you first talked to him about perfume?

A. As far as using the name is concerned, I don't know when he started using it. I know he was talking about it before he ever went up on the place where he had this set-up on Geary Street.

Q. In other words, he asked your reaction to the idea?
A. That is the idea.

Q. At that time did you ever pay any particular attention to the use of the name in combination with perfumes or other products? Did you notice that?

A. Well, as I say, my contact with the retail business was practically zero, only in talking with him he would tell me this, that, and the other thing. But I had no connection [212] with the retail business whatsoever.

Q. Did you observe this display room?

(Testimony of Walter James Moreland.)

A. Yes, he put in a fancy room there.

Q. Did you notice any products with the name Voodoo on them?

A. Oh, he had a list there as long as your arm, every name he could think of, as far as that is concerned.

Q. That was in the shop where he was doing business?

A. That is right.

Mr. Hutchinson: You may cross examine.

Cross Examination

Mr. McKnight: Q. Mr. Moreland, what other trademarks did you see there, displayed there at the time?

A. I wouldn't say trademarks. They were just names.

Q. What other names did you see besides Voodoo?

A. Oh, he had Forever, Red Red Rose—God, it's so long ago, by golly.

Q. Did you see a lot of bottles with numbers on them?

A. No, I don't remember any numbers.

Q. When did you talk with Mr. Rolley about coming here to testify?

A. Well, as a matter of fact he called me, oh, I guess it was sometime six or seven months ago, wanting to know if I would—if it really came to a court trial, if I would testify what I knew about the business, and I told him no reason I knew why

(Testimony of Walter James Moreland.)

not, just nothing but straight facts, why shouldn't I tell [213] anybody.

Q. You came here without a subpoena, did you not? A. That is right.

Q. You came voluntarily? A. Yes.

Q. And you were a personal friend of Mr. Rolley's?

A. Well, somebody you had done business with twenty years ago over a period of years, I don't know whether you would call them a personal friend or not, but I am pretty well acquainted with Mr. Rolley, yes.

Q. Have you done business with Mr. Rolley?

A. I have, as I say, I have never done any business since he got out of the shoe dyeing business because I had nothing to sell him.

Q. When did he go out of the shoe dyeing business? When did you stop selling him any materials?

A. Oh, his main business in that field, as I remember it, dropped off about a couple of years after he moved up to this place where he put in this perfume room. That must have been around about 1936 or 1937.

Q. And you quit selling him in 1936 or 1937?

A. As a matter of fact, I think the shoe dyeing business was just dying out, because that was the time they came out with a lot of new fabrics for shoes.

Q. Did you sell Mr. Rolley supplies for the shoe dye business? [214] A. That is correct.

Q. From what year to what year?

(Testimony of Walter James Moreland.)

A. Well, as I say, the spring of 1933 up until about 1936 or 1937.

Q. Who did he buy his shoe dye supplies from from 1936 to 1937?

A. So far as dyeing shoes is concerned, you see, the business changed entirely. Then it developed into a suede business, which was a question of dyeing suede shoes, which was entirely different from dyeing fabricated shoes.

Q. Didn't you sell those dyes to him?

A. No.

Q. Didn't you see Mr. Rolley up until about 1943? A. Oh, yes, sure.

Q. He was still in the shoe dye business at the time?

A. But the amount of shoe dye was very limited. The business switched to the suede business then.

Q. Can you tell us the date when you first saw a bottle of perfume bearing the name Voodoo in Mr. Rolley's premises?

A. God, no, I couldn't tell you.

Q. You couldn't tell us definitely? A. No.

Q. You have no documents which would as of this time—

A. As I say, my contact with Rolley was purely the production side, and the retail side of the business I didn't have any [215] knowledge of.

Q. Don't you want to go on oath before this Court as stating any date you saw a bottle of per-

(Testimony of Walter James Moreland.)

fume on Rolley's premises bearing the trademark Voodoo?

A. Voodoo or anything else, so far as I am concerned, as I say, I never got in contact with the retail end of the business.

Q. You don't know anything about the first bottle of perfume in Mr. Rolley's place you would be willing to swear to? A. That is correct.

Mr. McKnight: I move to quash the testimony of this witness on account of this gentleman knows nothing about the name Voodoo or use of the trademark.

Mr. Hutchinson: I would like to argue any such motion. This witness could only by some quite remarkable circumstance remember a specific date when he saw a specific bottle of Voodoo.

The Court: I will allow the record to stand. Let it speak for itself.

Mr. McKnight: Q. You never bought any Voodoo perfume from Mr. Rolley, did you?

A. No. As I say, I had no interest in the retail end of the business at all.

Q. All you can say is that you talked to Mr. Rolley about the word Voodoo as a trademark?

A. That is correct. As a trademark? Wait a minute—— [216]

Q. As a name? A. Just a name.

Q. But you don't know when he started to use the name on perfume?

A. I know he was using it. He was telling me about having used it.

(Testimony of Walter James Moreland.)

Q. Except what he told you, you don't know?

A. That is correct.

Q. All you know is what he told you?

A. That is correct.

Q. You didn't see any bottle you say you have any independent recollection of bearing the name Voodoo?

A. No, I have not. I didn't pay any attention to it.

Mr. McKnight: That is all.

Mr. Hutchinson: That is all.

(Witness excused.)

GERTRUDE LABHARD

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. My name is Mrs. Theodore Labhard. At the time I first knew Mr. Rolley I was Gertrude Menth.

The Court: Raise you voice a little.

A. Yes, sir. [217]

Direct Examination

Mr. Hutchinson: Q. Mrs. Labhard, you have known Mr. Rolley a number of years, have you not?

A. I came up from Los Angeles in December, 1938, and through a friend I was introduced—through some mutual friend I was introduced to him, and we were co-tenants, and I believe as near

(Testimony of Gertrude Labhard.)

as I can recall—I haven't got my records any more for it, but as near as I can recall it was February, 1939. I might be a little off in date, but as nearly as I can remember it was shortly after I came that this friend introduced me.

Q. What was the nature of your business at that time?

A. I made suede garments: dresses, hats, coats, gloves. And then Mr. Rolley was cleaning and dyeing suede garments and shoes, and our business more or less coincided.

Q. As a matter of fact, when you and your employees were absent, or his were absent, you would attempt to take care of one another's calls?

A. That was the agreement. We were both rather single-handed at the time, and when calls would come, he would answer my phone calls and I would answer his phone, and occasionally when he was out I would wait on his customers, also.

Q. At that time what was the address where you both occupied space, do you recall?

A. It was at 212 Stockton. We were there a very short time, and it was too crowded, and we moved to 239 Geary.

Q. Do you recall when you moved to 239 Geary, as to the year? [218]

A. It was a very short time after I was with him and was in the first part of 1939. The exact month I do not know. It might be two months. As near as I could recall, it would be about two months

(Testimony of Gertrude Labhard.)

after we were first together. I think that was the first of February.

Q. Calling your attention to the perfumes that might or might not have been present in the place, do you have any recollection of that subject?

A. When I first went with him he was making perfumes on a small scale and sold to some of his customers and to some of mine, and occasionally I would sell for him if he was busy or out.

Q. Was there a display or any arrangement for displaying perfume?

A. On Stockton Street there was just one case in the reception hall, and it had some things I had made in suede and some of his dyes and creams, and it also had a small display of perfume. Later when he and I moved to Geary there was an alcove in the room in the reception room devoted to just his perfumes.

Q. Before you moved, did you notice whether any of these containers of perfume had any names on them?

A. No, sir, so far as I can recall there were no names. The perfumes were sold by numbers only then. I don't recall any names. There are a few names that I can recall from when I later sold some on Geary. [219]

Q. That is some two months later?

A. About two months later. I don't remember the exact date.

Q. Do you remember whether there were names on the bottles were sold by name on Geary?

(Testimony of Gertrude Labhard.)

A. On Geary, as I recall, to the best of my recollection some of them were named and a great number were numbered. The first I recall I made a sample display for him, full of little tiny vials of different fragrances, and it was made of wood and I covered it and I lined it for him. Those bottles were numbered and the numbering card corresponded with the numbers with names to some of them.

Q. Do you recall any of those by name that had a name associated with them as far back as 1939?

A. Well, could I put that this way, I recall the names prior to about February of 1940. I don't know just—I can't exactly tell you when he first used them between the time that I first knew him and the first part of 1940, but I do know some of the names and I knew that he used them.

Q. Will you give us some of the names?

A. I could give you the names of those I particularly liked. I liked his Garden Paints and Red Rose, and there was a Wood Violet and a Lilac.

Q. Calling your attention to the name Voodoo, did you see or hear or observe the name, notice the use of Voodoo during that same period you knew Mr. Rolley's perfume? [220]

A. Yes, I remember it. He told me he had that name, and I could see no connection with it in regard to perfume. That is the reason I remember the name.

Q. You personally didn't use it yourself?

A. Most of the customers I waited on I sold

(Testimony of Gertrude Labhard.)

them as a steady customer—numbers on a sheet here, and tell by number. They would come in and buy perfume by number. After that there were labels, but I don't know when that was.

Q. You think it was during this period, 1939-1940 he started using labels?

A. He used a label prior to 1941. Just what time in between that period he started using labels on them I don't recall. I do know it was before 1941, because I got married in 1941 and no longer had a business in March.

Q. To your recollection that first antedated 1941?

A. Yes. I was married in March, 1941.

Q. Did you see any labels at any time during that period hearing the name Voodoo in Mr. Rolley's perfume premises or display case?

A. He had the name then. I don't recall a label, but I recall the name was on the card. It was a strange name and I remembered it. [221]

* * * * *

Cross Examination

Mr. McKnight: Q. Were you in the business connected with shoes, suede garments, and things of that nature in 1938 when you first met Mr. Rolley?

A. I met Mr. Rolley—I didn't come to San Francisco until the end of 1938. I met him the first of 1939, and it was—the reason I said I think it was February when I first met him, I have some records I have kept in regard to teach-

(Testimony of Gertrude Labhard.)

ing pattern drafting, and I have a letter written by him. That was in 1941 [222] and it was in February, and it said that he had known me for two years. He stated we had been co-tenants for two years. That is the reason I think it was February. It might have been March.

Q. Approximately February, 1939?

A. Yes.

Q. Mr. Rolley's business was primarily in the shoe dyeing business?

A. And cleaning of suede garments.

Q. Was that his primary business at that time rather than perfumes?

A. He had all three. He dyed shoes, cleaned suede garments, and we had a perfume display in the counter.

Q. When did you move to Geary Street? Approximately April, 1939, is that right?

A. Approximately there. I don't remember the month. We were there on Stockton a very short time.

Q. On both Stockton Street and Geary Mr. Rolley had perfumes that bore numbers, is that correct? A. Yes, sir.

Q. Did you help him sell some of the perfumes that had numbers? A. Yes, sir.

Q. What did these people ask for when they came in for perfume?

A. A number of them would bring their bottle back.

Q. Did some of them ever use the names that

(Testimony of Gertrude Labhard.)

appeared on the [223] card that showed what the numbers meant? A. Occasionally.

Q. For instance, you had a card that explained what these numbers meant?

A. Yes, sir.

Q. Were these numbers copies of famous perfumes?

A. There were a couple of names that I had heard before, but the great many of them I had never heard. Most of them I had not. A lot of them were not named at all.

Q. I show you a list that bears names and ask you what name or names were familiar to you during the time you sold perfume for Mr. Rolley?

A. I think Wicked. I don't know about Torrid.

Q. Had you Forbidden Flame on the list?

A. I don't remember that name. Serenade, I think, and Rendezvous and Forever, and the Florals, I remember most of those because those I was partial to.

Q. You say you never saw the trademark Voodoo on a label in Mr. Rolley's, is that correct?

A. No, sir. He started with the labels——

Q. You didn't see it yourself, you saw it on a card, I thought you said.

A. Just before I discontinued by business he had started with the labels then.

Q. But did you ever see a Voodoo label while you were— [224] I maybe misunderstood your direct testimony, but I thought you said that you

(Testimony of Gertrude Labhard.)

did not see a Voodoo label while you were there and before you were married.

A. I don't recall the name on any label. I do recall he started using labels before I discontinued.

Q. But you cannot say under oath you saw a Voodoo label, can you?

A. No, sir, but I remember, I am quite sure I remember the name as being sold then because I recall it is such a strange name.

Q. But you didn't see it on a bottle that you can definitely say?

A. It was on a card that he had.

Q. You say it on a card but didn't see it on a bottle, is that correct?

A. Yes, I guess that is right. [225]

* * * * *

ALMA HOMILIUS

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Alma Homilius—H-o-m-i-l-i-u-s.

Direct Examination

Mr. Hutchinson: Q. What is your business and occupation, Mrs. Homilius?

A. I am in the making of garments.

Q. Are you acquainted with Mr. Rolley?

A. Yes, I am.

Q. Do you recall when you first became acquainted with him?

(Testimony of Alma Homilius.)

A. Oh, it would be back in 1932.

Q. What was your first acquaintance with him, in what connection?

A. Well, he happened to be in the same building I was in business.

Q. Do you recall the address?

A. 212—Stockton. [226]

Q. At that time did you have any occasion at any time to visit his place of business?

A. Yes, I did.

Q. Do you recall at what time, if at all, you noticed his doing anything with perfumery?

A. Well, yes, because I think I got most of his samples.

Q. In other words, he tried it out on you, so to speak, is that right? A. That is right.

Q. And that occurred at 212—Stockton Street?

A. That is right.

Q. Do you recall any of the names of the earlier products he used?

A. Yes, I think I do. One is Voodoo.

Q. Do you recall any of the others at this time?

A. There was one, Red Red Rose.

Q. When do you recall first having seen or heard the use of Voodoo in connection with any of his perfumery products?

A. Well, it was shortly after that, after 1933 or something like that.

Q. In other words, rather shortly after you had become acquainted with him?

(Testimony of Alma Homilius.)

A. That is right.

Q. Do you recall he remained in that building for some few years? [227]

A. Oh, yes. He was across the hall from me.

Q. That is, he had more than one location in the same building? A. That is right.

Q. Did you see any of his perfumery products around his place of business?

A. Well, yes.

Q. He had a display case of some sort?

A. Yes, small display case at 212—Stockton.

Q. If I remember correctly, you stated that from time to time he brought in some new preparations? A. To get my okeh.

Q. Did he discuss with you the appeal, if any, of the names he had thought of to use?

A. At first he used numbers, then later on the names came in.

Q. To the best of your recollection, then, you think Voodoo was used about 1933 to 1934?

A. That's right.

Mr. Hutchinson: You may cross examine.

Cross Examination

Mr. McKnight: Q. Is your name Mrs. Homilius?

A. Miss Homilius.

Q. Were you a neighbor of Mr. Rolley's at 212 Stockton Street? A. Yes.

Q. Did you live next door to him? [228]

A. Just across the hall.

(Testimony of Alma Homilius.)

Q. Did you know Mrs. Rolley?

A. I did.

Q. Are you related to Mr. Rolley in any way?

A. No, I am not.

Q. Or to Mrs. Rolley? A. No.

Q. How did you hear about coming here to testify?

A. Oh, I think Mr. Rolley talked to me.

Q. Who did? A. Mr. Rolley.

Q. How long ago?

A. Oh, I think last week or two weeks, something to that effect.

Q. He used to give you samples of his perfumes? A. That is right.

Q. Did he give you samples of any of the numbered perfumes?

A. Well, that I don't—at first, see, he just used numbers, trying to get some names.

Q. Do you recall he referred to any of the numbers by name?

A. That I wouldn't remember.

Q. Did he ever refer to any other trademarks than Red Red Rose and Voodoo?

A. Well, that Garden Pink, Forever.

Q. You never bought any perfumes of Mr. Rolley, did you? [229]

A. No. I usually got mine.

Q. You always got them for nothing?

A. That is right. But I have handled them and I have been in the shop for other business.

Q. When did you start handling them?

(Testimony of Alma Homilius.)

A. I mean just reach over and look at them when I was in the shop.

Q. Oh, I see. But you never bought any yourself or paid for any? A. No, I didn't.

Q. Well, now, did Mr. Rolley have a list of perfumes in his shop at 212 Stockton?

A. That I didn't pay any attention to.

Q. Did you see the name Voodoo an any of the bottles he gave you?

A. Yes, when he was on 239 Geary, when he had them.

Q. He had a name on the bottles at 239 Geary, but he didn't have any on the bottles when he was on Stockton Street?

A. Well, that is going back quite a ways.

Q. This is important, Miss Homilius. You don't recall seeing Voodoo on the bottles at Stockton Street, do you? A. No, I don't.

Q. About what year did you see the name Voodoo on the bottle at Geary Street? How many years later would that be?

A. That I could check back just what year he was on Geary Street. [230] I think he left our building 1939, 1938. I don't know. That is the best of my knowledge.

Q. Did you get any samples of the perfume from Mr. Rolley after he was on Geary Street?

A. No, I guess not.

Q. So the only samples of perfume you received from Mr. Rolley were while you were on Stockton Street, is that correct?

(Testimony of Alma Homilius.)

A. Well, now, he has given me sample when I have met him in the street.

Q. Do you recall any samples you ever received in which Voodoo appeared on the bottle?

A. Well, it must have been there.

Q. Well, you don't know of any that you say under oath that you received?

A. Well, get perfumes, you don't always look at the label when someone gives it to me.

Q. You can't testify here this morning on the stand as to any date when you ever received a bottle from Mr. Rolley that had the name Voodoo on it, can you?

A. No, just that I knew it was Voodoo.

* * * * *

Redirect Examination

Mr. Hutchinson: Q. In your discussions with Mr. Rolley of [231] names of perfumes, did you ever discuss with him the name Voodoo, make any comment on it?

A. Yes, I did, because I wanted to know the origination of the name. In fact, I called the word "Hoodoo."

* * * * *

MRS. EDWIN A. WIGGLEY

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Mrs. Edwin A. Wiggley. [232]

* * * * *

(Testimony of Mrs. Edwin A. Wiggley.)

Direct Examination

Mr. Hutchinson: Q. Mrs. Wiggley, are you acquainted with Mr. Rolley? A. Yes.

Q. Do you recall when you first became acquainted with him?

A. Well, it was during the War, approximately 1943.

Q. And in what connection did you come to know him? A. As a customer.

Q. And what type of service or product did you purchase from him? A. Perfumes.

Q. Do you recall what place he had, that is, the address of his place at that time?

A. Not the number. It was on Geary Street, down at the same place where he is now.

Q. And that was on a street level location?

A. Yes.

Q. Did you at that time examine the contents of the shop or observe them as to the type of perfume or names on display there?

A. He had a very nice shop with all kinds of perfume displayed.

Q. Calling your attention to the name Voodoo, did you see that displayed at that time in conjunction with any of his perfume products? [233]

A. Yes.

Q. Did you personally purchase that commodity? A. Yes, I did.

Q. And was it perfume only, or were there other products by the same name?

A. Just perfume and cologne.

(Testimony of Mrs. Edwin A. Wiggley.)

Q. Did you purchase both of those?

A. Yes, I did.

Q. Do you recall approximately when you made the first purchase?

A. Well, I am sure that I was there when he first opened that shop. I don't know the date that was exactly. It was during the War.

Q. You think it was 1943 or thereabouts, is that right?

A. Yes. It may have been earlier.

Q. Now, did you have any friends who also shopped at Mr. Rolley's place?

A. Most of my friends had me do the shopping. I would make purchases for other friends, and I may have sent him some customers, but I don't know.

Q. In shopping for other friends, rather, your friends that you would shop for, did you purchase Voodoo products for them?

A. Yes. [234]

* * * * *

Cross Examination

Mr. McKnight: Q. Mrs. Wiggley, you are now a housewife? [235] A. Yes.

Q. Do you sell any perfume now for Mr. Rolley?

A. No, I never have.

Q. You purchased for your friends?

A. Well, I mean just like my neighbor, I say, "Will you buy me a loaf of bread?" When I go to the store I picked up various articles for people.

Q. As a personal favor for them?

(Testimony of Mrs. Edwin A. Wiggley.)

A. That's right.

Q. I see. Now, you have no sales receipt for any of the Voodoo perfume that you brought from Mr. Rolley?

A. No, I do not.

Q. Did he ever give you any at the time you made the purchase?

A. Oh, yes.

Q. Each time you made a purchase?

A. But I threw them away.

Q. You didn't keep them?

A. That is right.

Q. So you only fix this date by the War?

A. Yes, I do.

Q. Could it be in 1944?

A. No, it would be earlier than that. I can fix it by my job, and also we made a move at that time.

Q. Were you working in 1943 for the Orpheum Theater?

A. Yes. [236]

Q. Did you work in 1944?

A. Yes.

Q. Well, then, you might have—you can't fix it just by your work.

A. No, I can fix it by our move. We moved in 1942 on Sacramento Street, and it was right at that time that I made all of the purchases of perfume.

Q. Did you have again afterwards?

A. No, I stayed there until after the War.

Q. It was after that you bought it?

A. Yes.

Q. After 1942?

A. It would be the latter part of 1942 or 1943.

(Testimony of Mrs. Edwin A. Wiggley.)

Q. And you have no other way of fixing it except from your memory? A. That is right.

Q. Can you tell us anything else that you bought in 1942 or beginning of 1943, any other products? A. I bought furniture.

Q. Do you recall buying any perfume from any other source?

A. Yes. I buy lots of perfume.

Q. Did you ever buy any Tabu products?

A. No, I can't wear it.

Q. Did you ever buy any perfumes of famous brands? A. Yes. [237]

Q. Chanel No. 5? A. Yes.

Q. Did you ever buy any of Mr. Rolley's reproductions by number?

A. No, I never did.

Q. Did you ever know that he sold them?

A. No, I didn't.

Q. Now, will you give us the name of any other perfumes that you bought in 1943, and tell us where you bought them?

A. I believe I bought Mais Oui.

Q. Where did you buy that?

A. At Weinsteins.

Q. Who puts out Mais Oui?

A. I don't know. They make Evening in Paris, I believe.

The Court: Weinsteins is right down the street here?

A. That is right.

Q. They handle everything?

(Testimony of Mrs. Edwin A. Wiggley.)

A. They do.

Mr. McKnight: Q. How did you happen to come here to testify? Did Mr. Rolley ask you to?

A. Not exactly. I was in his shop almost a year ago now, buying quite a bit of perfumes for the holidays, and it was mentioned something about this and I volunteered to come at that particular time.

Q. As a personal friend? [238]

A. No, as a customer. I mean, I remember Voodoo and I thought that was only the right thing to do.

Q. Have you ever testified before in court?

A. No, never have.

Q. But you came here this morning without a subpoena? A. That is correct.

* * * * *

NATALIE ANIS

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Natalie Anis.

Direct Examination

Mr. Hutchinson: Q. Mrs. Anis, do you have any employment or business?

A. I work for Rolleys, Incorporated.

Q. And you have been working with Rolleys, Incorporated, for how long?

A. Roughly ten, eleven years.

(Testimony of Natalie Anis.)

Q. You worked for Mr. Rolley, then, did you, before the incorporation, is that right?

A. Yes. [239]

Q. When did you first start to work for him?

A. February or March, 1940.

Q. At that time what was the nature of your work with Mr. Rolley?

A. Well, I did a little bit of everything.

Q. Did you do any selling of the products in the perfume line? A. Sometimes, yes.

Q. Did you look after some of the books and correspondence? A. Some correspondence.

Q. Now, did you become familiar at that time, that is, when you first went to work, with supplies and what not, perfume, and the labels and the other things? A. Yes.

Q. At that time did you observe any product that was designated as Voodoo or by the name Voodoo? A. Yes.

Q. Could you tell us briefly what those products were?

A. Perfumes in bottles of different sizes.

Q. Yes. Did you see any labels bearing that name? A. Yes.

Q. Did you see any bottles with labels during—

Mr. McKnight: (interposing) Your Honor, all this has been very leading, and I think counsel should ask the witness what she saw instead of putting the words into her mouth. [240]

(Testimony of Natalie Anis.)

Mr. Hutchinson: I think there is nothing leading about this.

The Court: Yes, there is. The questions are leading and suggestive.

Mr. Hutchinson: Q. Will you state what, if anything, you observed, Mrs. Anis, with regard to bottles of any nature bearing any label making reference to Voodoo?

A. We had some Voodoo strips, the old style which came in strips about one half by four, about twelve or fifteen names, horizontal, instead of the individual pieces we have now.

Q. How were those used by you in working for Mr. Rolley?

A. We cut them into individual strips.

Q. And were there any names on these strips so that when you cut them they would remain as a separate name on the part that had been cut off?

A. I am sorry?

Q. I am not sure I understand what you mean by strips. Long strips with various names?

A. No. For Voodoo? May I use my hands?

The Court: Yes.

A. They were that high (indicating)——

The Court: One half inch high?

A. The Voodoo was imprinted horizontally.

Q. It would be printed off and on on the strip?

A. Yes. [241]

Q. When you say you cut it, you mean you cut between the printing so that you had a "Voodoo" left on each piece?

(Testimony of Natalie Anis.)

A. That is correct.

Q. Is it also not true those wrappers were prepared so that they would adhere to things if applied? A. Yes.

Q. Did you do any work in preparing perfumes? I mean by that, packaging them or anything of that nature?

A. I did package them, yes.

Q. Did you have anything to do with the placing of these wrappers, as you have described them, on any container?

A. On the bottles after they were bottled, yes.

Q. Did you have any occasion to place those on exhibition in the shop or anywhere?

A. Into the stock boxes.

Q. Were they kept on the premises?

A. Yes, under the counter.

Q. At that time I believe the business was a retail business, is that true? A. Yes.

Q. Subsequently was there any change in the nature of the business?

The Court: Do you understand that question?

A. I am sorry, sir, I don't.

The Court: Tell him you don't. [242]

A. I am sorry, I don't understand.

Mr. Hutchinson: Q. I see. Perhaps counsel will not object to my directing your attention to the fact that there may have been a change from a purely retail business to a retail and wholesale business. Directing your attention to that subject,

(Testimony of Natalie Anis.)

did Mr. Rolley, or the company ever go into the wholesale sales?

A. Not at that location, no.

Q. This particular location was in what place?

A. 239 Geary.

Q. Was that a street level shop or above the street level? A. Above the street level.

Q. And there was a subsequent move from 239 Geary to Stockton—to some other place, is that true? A. Yes.

Q. What was the next address that you remember? A. 108 Geary.

Q. Was that also above the street level in the building, or was that a street level office?

A. Street level.

Q. At that time did you do somewhat the same sort of work for Mr. Rolley in his business?

A. Yes.

Q. And at that time was there any wholesale business conducted by Mr. Rolley?

A. Yes. [243]

Mr. McKnight: This is objected to unless you tell when.

The Court: Fix the time.

Mr. Hutchinson: Q. Do you recall the approximate time when you moved to 108 Geary?

A. Let's see, '42 or '43.

Q. Do you have any way of fixing that in your mind, any other event or anything of that sort to fix the date?

(Testimony of Natalie Anis.)

A. I can't say I am sure about it, the year, but it was before Christmas.

The Court: In what year?

A. It must have been '42. 1942.

The Court: 1942?

Mr. Hutchinson: Q. In 1942? That was the year after the outbreak of the War. Does that also fit in with your recollection? A. No.

Q. All right, then, at 108 Geary there was some wholesale business done, that is, selling to the public, is that true? A. Yes.

Q. At that time do you recall the use of Voodoo as a name for perfumes in connection with Mr. Rolley's business? A. Yes.

Q. Since that time the business has continued at several addresses, is that true?

A. Yes. [244]

Q. Can you tell us the other addresses where business was carried on by Mr. Rolley or by the company in chronological order?

A. 361 Sutter Street.

Q. When was that place operated?

The Court: What year?

A. Latter '42.

Mr. Hutchinson: You say 1942? Did Mr. Rolley have two places at that time?

A. I am sorry. We had 108 and 120. They were next door. And the Sutter Street served as a wholesale outlet with a retail front.

Q. In other words, there were more than one place at that time, is that right, Sutter and Geary?

(Testimony of Natalie Anis.)

A. Sutter and Geary.

Q. During those times, did Mr. Rolley or not have a supply of Voodoo products?

A. He did.

Q. Did he also offer them for sale during that time? A. Yes.

Q. You did some of the sales work yourself, did you not, waiting on customers? A. Yes.

Q. Did you personally at any of these times sell any Voodoo products? [245] A. Yes.

Mr. McKnight: Objected to unless he fixes the time again, your Honor. It is very vague.

Mr. McKnight: We endeavored to do so.

The Court: When did you sell these Voodoo products?

A. There was a young lady working for us, Mrs. June——

The Court: Just a minute. You will have to try to fix the time as near as you can.

A. Oh, Christmas, '42.

The Court: 1942?

Mr. Hutchinson: Then Christmas time, 1942, is the time—you did sell Voodoo products for Mr. Rolley then, is that right? A. Yes.

Q. Did you do that continuously or only during the Christmas season? A. Continuously.

Q. From that time on did you continue to sell Voodoo products for Mr. Rolley or subsequently the Rolley Company?

A. Excuse me, sir, I wasn't strictly a sales person, so I could say that I sold it continuously.

(Testimony of Natalie Anis.)

Q. I understand. You did so from time to time?

A. Yes.

Q. In other words, you were helping in the office, helping with the stock, and also with sales when there was more business [246] than the clerk could handle, is that right? A. Yes. [247]

* * * * *

Q. In connection with your work you also had occasion, did you not, to receive orders that were sent to the company, or to Mr. Rolley, before, for his filling or the company's filling? [248]

A. Yes.

Q. I will show you Exhibit X for the defendant, and I will ask you to examine the contents of this folder bearing letterhead of Rolley and dates November 16, 1943, and other 1943 dates, and ask you if you can identify any of those documents?

A. Yes.

Q. On those documents there are, as I recall no names, that is true, is it not? A. Yes.

Q. These are what? That is, what is the purpose of these documents in the business?

A. We have our—let's see, how can I say that?—we have the corresponding numbers for the different names.

Q. And those are what you call stock numbers?

A. Stock numbers. Instead of writing the full name we write the stock number.

Q. The number 54 I see here. What does that mean? A. Voodoo.

Q. Had that been true throughout the time you

(Testimony of Natalie Anis.)

have been with Mr. Rolley and the company?

A. Yes.

Q. Did you prepare any of these particular bills? Will you examine them and see if you did.

A. Some of them I did, yes.

Q. Those documents I have just shown you, Defendant's Exhibit X, [249] are in general invoices, are they not? A. Yes.

Q. I show you now Defendant's Exhibit Y relating to the year 1944, bearing dates, and I will ask you if you will briefly examine that file and state whether you can identify it and what its contents are in a general way?

A. These are the original orders from our accounts, and our invoices.

Q. Had you seen any of those at the time or about the time that they were either received or made up in the office where you worked?

A. Yes.

Q. Did you yourself have anything to do with filling the orders? A. Yes, I did.

Q. And did you yourself have anything to do with preparing the invoices?

A. Some of them, yes.

Q. And you recognize some of them as yours, do you not?

A. Yes, I do. My initials are here. [250]

* * * * *

Cross Examination

Mr. McKnight: Q. Mrs. Anis, your work for Mr. Rolley in 1940, February of that year, what kind of work did you do for him?

(Testimony of Natalie Anis.)

A. We had the dye shop, also, and I worked in the dye shop.

Q. What kind of work did you do in the dye shop? A. Dyeing.

Q. Then in 1943 you did more work in the perfumes? A. Yes. [252]

Q. What duties did you have in connection with the perfumes, Mrs. Anis, did you type the invoices yourself? A. Yes.

Q. Are you able to recognize the invoices you typed by just looking at the typing?

A. Yes.

Q. Can you tell your typing from other typing?

A. From Mr. Rolley's, yes.

Q. And he is the only other one that did typing? A. Let's see. No——

Q. (interposing) I call your attention to——

The Court: I don't think the witness has finished her answer.

Mr. McKnight: Q. Oh, continue, please.

A. We had a Miss Irene—oh——

The Court: Is this another typist?

A. She did some typing.

Mr. McKnight: Q. Calling your attention to Defendant's Exhibit X, and to the second page thereof, can you tell me who typed that?

A. That is mine.

Q. How can you tell that you typed it?

A. For one thing, the typing is evener. I have a certain way of setting type.

The Court: Read the answer. [253]

(Testimony of Natalie Anis.)

(Answer read by the reporter.)

Mr. McKnight: Q. Is this different from anyone else's? A. Yes.

Q. Do you use a typewriter different from anybody else's?

A. I recognize my own typing, that is all.

Q. Can you tell us any particular characteristic in that shape that makes you recognize it as your own, distinguished from any other typist's?

A. I believe that I was the only one typing that year.

Q. But otherwise you can't distinguish the typing from any other typist's who might have written this, can you?

The Court: Do you understand that question?

A. I am sorry, sir, it isn't clear to me.

The Court: Well, tell him, then.

A. May I have that question again, please, sir?

Mr. McKnight: Q. You recognize this, you say, because no one else was typing there at that time, is that correct?

A. Sometimes Mr. Rolley did.

Q. Is there any way you can say your typing differs and recognize it as your typing?

A. As I said before, Mr. Rolley and I did the typing, and I will recognize my own from Mr. Rolley's.

The Court: In what way would you be able to do that?

A. He struck over his keys.

(Testimony of Natalie Anis.)

The Court: What is that? [254]

A. He struck over his keys.

The Court: How do you know that?

A. Because I have seen too many of his invoices.

The Court: You typed on the same typewriter?

A. Yes, sir. My typing is evenner.

Mr. Hutchinson: That is the way I tried to type, your Honor, but I always brought two or three keys up at once and it did not work very well and I quit.

The Court: How long have you been typing?

A. I am not strictly a typist.

The Court: I didn't ask you that.

A. I am sorry, sir.

The Court: I didn't think that was your profession, but when did you first start typing?

A. I learned in school.

The Court: Where?

A. In Commerce High.

The Court: Did you keep continuing from time to time typing?

A. Yes.

The Court: Did you have at any time a machine of your own?

A. Yes.

The Court: Was this the machine?

A. No, I have a portable. [255]

The Court: Oh, you have a portable.

A. Yes.

The Court: All right.

(Testimony of Natalie Anis.)

Mr. McKnight: Q. Now, you say that Mr. Rolley had only retail sales until around Christmas of 1942, is that correct? I am talking about retail sales of this perfume and cologne.

A. No, he had wholesale prior to that time at 239 Geary.

Q. When did you move to 239 Geary?

A. We didn't move. I applied at that address.

Q. That is where you began work?

A. Yes.

Q. And he had wholesale sales of perfume there? A. Yes.

Q. To whom?

A. To a concern in Honolulu.

Q. But you have no records of that?

A. I do not.

Q. The first records you have of wholesale sales are in 1943 of Mr. Rolley's perfumes?

A. No.

Mr. Hutchinson: I think, counsel, you'd better establish whether she has the records.

Mr. McKnight: Q. That you have any knowledge of, goes back as far as 1943?

A. It was before 1943. [256]

Q. But you don't have them here today?

A. I don't have them in my hands, sir.

Q. What perfume is No. 35?

A. Red Carnation.

The Court: What is it?

A. Red Carnation.

The Court: How do you know that?

(Testimony of Natalie Anis.)

A. Because we have a price list and I memorized it when I started working.

Mr. McKnight: Q. Do you know the correspondent names for all the numbers?

A. Yes, sir.

Q. Was Mr. Rolley selling Forbidden Flame when you were with him? A. Yes.

Q. How long did you sell that?

A. If there was a call for it we had it in bulk.

Q. What was the number of that?

A. 15.

Mr. McKnight:

Redirect Examination

Mr. Hutchinson: Q. I have just one question, please, Mrs. Anis: Do you recall when the dye shop operation of Mr. Rolley was terminated, or closed out?

A. When we moved to 108 Geary. [257]

Q. In other words, you had the dye shop operation at 239 Geary, but when you moved you just opened up an exclusive perfume business?

A. We were more or less at the tail end of it.

Q. The dye shop work had been shrinking before that, is that true? A. Yes.

Mr. Hutchinson: I think that is all.

Recross Examination

Mr. McKnight: Q. Do you have any of your old labels that you used to cut into strips?

A. No.

(Testimony of Natalie Anis.)

Q. The only labels that you have now are those you have had on your lap only the last few minutes?

A. No, we have the old type sheet, but it is cut into individual strips as these.

The Court: Or sheets, you mean?

A. No, sir.

The Court: You said that you had them in sheets and cut them in strips.

A. That is the very first, then,—

The Court: That is as I recall the testimony.

Mr. McKnight: That is all, thank you.

The Court: Just a minute. I am going to ask you a few questions. [258]

Examination by the Court

Q. You don't mind my asking you a few questions? A. No, sir.

Q. Where do you live?

A. That depends.

Q. Where do you live now?

A. In Los Gatos.

Q. With whom? A. Friends.

Q. How long have you lived there?

A. Oh, maybe two months.

Q. And you lived in the City here before that time? A. Yes.

Q. Where? A. 1523 Sacramento.

Q. With whom? A. Alone.

Q. Where were you born? A. Japan.

Q. How long ago?

A. '14. Oh, I am sorry. How long? 1921.

(Testimony of Natalie Anis.)

Q. That is all right. Tell me when you first went to work? Do you recall that year, in this dye shop? That is where you were employed, if I followed your testimony? A. Yes, sir. [259]

Q. What kind of work did you do?

A. In the dye shop I dyed.

Q. How long did you do that?

A. About two or three years.

* * * * *

CHARLES A. ROLLEY

recalled, previously sworn.

Direct Examination

Mr. Hutchinson: Q. Mr. Rolley, I call your attention to the way in which you dispensed the perfumes during the early days and how they were labeled. In that connection, did you or did you not maintain a supply of bottled perfumes in the various fragrances, prepared in advance? [260]

A. A good many of them we had in what we call bulk. That is, a large, plain bottle. And then when we would sell it, we would take what we call a pipette, that was like a metal tube at the bottom and a syringe at the top, and a customer would buy a small bottle of perfume and we would take that pipette and fill that bottle with perfume and cap it and attach a label to it then.

Q. Was that the method in which you handled some of your bottling and labeling at the time you were associated with Mrs. Labhard?

(Testimony of Charles A. Rolley.)

A. Yes, that was.

* * * * *

Mr. Hutchinson: If the Court please, we have one other witness, a lady who is in Sacramento and can't be here today. I believe she will be here in the morning. [261]

* * * * *

VIVIAN ROLLEY

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Vivian Rolley.

Direct Examination

Mr. Hutchinson: Q. You are the wife of Charles A. Rolley, are you not?

A. Yes, I am.

Q. And have been for a number of years, is that true? A. Yes.

Q. Calling your attention to 1932, 1933, and 1934, you were married at that time, were you not? A. No, previous to that—1927.

Q. During the years 1933, 1934, 1935, were you employed in any work?

A. Yes, for H. Leibes and Company.

Q. What was the nature of your duties in that place?

A. Well, I was selling, and then was promoted to floor manager, hostess. [263]

Q. That is, I believe, a retail store, is it not?

A. Yes, it is.

(Testimony of Vivian Rolley.)

Q. And specializes largely in wearing apparel, and other things of interest to ladies rather than men? A. That is right.

Q. That was true at that time? A. Yes.

Q. Do you recall your husband's business in the cleaning and rehabilitation of shoes and leather goods? A. Yes.

Q. Have you any recollection as to the time he started, if he did, to do something with perfume? A. Yes, I do.

Q. Do you recall when that was?

A. Around possibly '33.

Q. At that time you were employed on a full-time basis at H. Leibes & Company?

A. Yes.

Q. Did you have any conversation, or did you at any time visit the establishment of your husband? A. After work.

Q. In that connection, did you discuss with him his ideas for perfumes and starting a perfume line? A. Yes, I did.

Q. As a part of those conversations did you or did you not [264] discuss with him names or possible names for such product? A. Yes.

Q. I call your attention to the name Voodoo, and I will ask you if you at any time had any discussion with Mr. Rolley regarding that name as a name for perfume?

A. I certainly did. I was the one that suggested the name to him.

Q. Do you recall approximately when you suggested it to him?

(Testimony of Vivian Rolley.)

A. Well, I would say that it was about a year after he had made his first perfumes.

Q. Can you fix that as to the year by date?

A. I would say it was at, oh, the end of 1933 or around the first part of 1934.

Q. At that time did you have access—withdraw that, please. In the H. Leibes Company was there a perfume department, or any perfumery sales?

A. Yes. I worked in that department when I first went to work there.

Q. You were acquainted with the personnel of that department? A. Oh, yes.

Q. At the time you were discussing names with your husband for perfume products, did you resort to the Exhibit of Perfume at the H. Leibes & Company for reference to names and that sort of thing? [265]

A. Well, only inasmuch as we needed names for the perfumes, and naturally we didn't want to use names that someone else was using, so we were looking for something different.

Q. Did you make any inquiry of the other personnel of the H. Leibes & Company who dealt with perfumes with regard to the name Voodoo at the time you suggested it there? A. Yes.

Q. By the way do you recall the name of any of the persons you discussed that with?

A. Well, there was some literature there, or kind of a booklet, catalogue, whatever you want to call it, with names.

Q. Do you remember consulting that document?

(Testimony of Vivian Rolley.)

A. Yes.

Q. Could you describe in a brief way its composition?

A. Just a printed—just printed matter. I don't know what you would call it exactly. I had no name for it other than from an information standpoint.

Q. Did it contain names of manufacturers of perfumes and cosmetics? A. Yes.

Q. Did it list trade names of such companies, and did you make any search of it with regard to any of these names?

A. Yes, definitely.

Q. And did you, at that time, discover any reference to Voodoo? A. No. [266]

Q. Recalling your attention to the conversation you had with your husband on the subject of the name Voodoo, would you state briefly the conversation?

A. I am sorry, would you repeat that?

Q. Could you state briefly the conversation you had with Mr. Rolley concerning the name of Voodoo at the time you suggested it to him?

A. Well, the way I understand the question is this, that we had need of a perfume of a heavier, richer type, and after—because most of his perfumes were of a light, floral type; and so he made a perfume, and of course we had to have a name for it, and it seemed something with a heavier oriental type or something that was richer, so I suggested these names to him.

(Testimony of Vivian Rolley.)

Q. And that was in 1933 or 1934, as you recall?

A. Yes.

Q. Do you recall having been in Mr. Rolley's place of business subsequent to that time and having there observed the name Voodoo in any connection?

A. I am sorry, I don't get that very clear.

Q. Well, did you ever go to Mr. Rolley's place of business after 1934, or later and suggesting the name Voodoo to him?

A. Well, do you mean was I active in his place of business?

Q. No. I understand you didn't participate directly in the business? [267]

A. No, I didn't.

Q. But did you ever visit the place in 1934 or later? A. Oh, yes.

Q. Did you observe the name Voodoo exhibited in any manner? A. Yes, I did.

Q. Will you tell us briefly what you observed with regard to the name Voodoo?

A. Well, I saw the bottle as a finished package, with the contents in the bottle, and I saw the label and I also saw the labels before they were put on the bottle.

Q. Now, did you consult with your husband at the time this product was being worked out by Mr. Rolley, the Voodoo product?

A. Well, naturally I was interested.

Q. I have here a container bearing No. 54, and

(Testimony of Vivian Rolley.)

I will ask you to examine it and state what it is, if you know.

A. Yes, I remember it well. It is the original Voodoo, No. 54.

Q. Where did you last see this before coming here this morning? Did you bring the bottle?

A. I brought it.

Q. And where did you get it?

A. From my home.

Q. How long, if you know, was it in your home?

A. Well, I have had it for quite some time. I would say that that product is about, or that bottle is about sixteen, eighteen [268] years old.

Mr. McKnight: Your Honor, I am going to object at this time to this bottle, any further testimony in regard to it. It shows the number 54 thereon, and doesn't have the trademark Voodoo thereon, and I think it is incompetent, irrelevant, and immaterial to the issues in **this case**.

The Court: What is the purpose of the offer?

Mr. Hutchinson: To establish a use of the number, your Honor, and the fact that this was an original product, and the date of it, and the length of time.

The Court: For that limited purpose I will allow it.

Mr. Hutchinson: Thank you, your Honor.

The Clerk: Plaintiff's Exhibit J-1 admitted and filed in evidence.

(Bottle referred to was admitted into evidence as Plaintiff's Exhibit J-1.)

(Testimony of Vivian Rolley.)

Mr. Hutchinson: Q. By the way, Mrs. Rolley, the number 54 on this bottle, do you know what, if anything, that signified or meant in your husband's business at that time.

A. Yes. All our perfumes had a stock number, and that is the stock number on it.

Q. Mrs. Rolley, after 1934, did you at any subsequent time observe in Mr. Rolley's place of business Voodoo products with the name on the label attached to the container?

A. I would see them attached to the container, yes. [269]

Mr. McKnight: This is objected to, your Honor, unless the time is more definitely fixed.

The Court: Fix the time.

Mr. McKnight: He says after 1934.

The Court: Fix the time.

Mr. Hutchinson: Very well. We have to start somewhere, counsel.

Mr. Hutchinson: Q. You tell how frequently, and giving the years, if you know, subsequent to 1934 that you observed Voodoo products with such label identification?

A. As to the date, I think that at the end of 1933 or sometime the first part of 1934, was when the perfume was created and named and ready for sale, and since then.

Q. Did you see any in his place of business bearing that label in the year 1934?

A. Yes.

Q. And is the same true or not true with re-

(Testimony of Vivian Rolley.)

gard to the year 1935? A. Yes.

Q. Is your answer the same with regard to the years 1936, 1937, 1938, 1939 and 1940?

A. That is right. We have always had it.

Q. Subsequent to the time you worked at H. Leibes & Company, I believe you stated you did become directly associated with Mr. Rolley in his business, is that true? [270] A. In 1947.

Q. At that time you made it your full-time occupation during the daytime, is that right?

A. That is right.

Q. What were your duties in general at the Rolley establishment?

A. Oh, selling, and counter display and stock work, filling and labeling, and, oh, general.

Q. In that connection, did you have occasion at any time in 1943 or subsequently to sell any Voodoo perfume? A. In 1943? Yes.

Q. Yes. And is that true as to later on, 1944, 1945, and so on? A. That is right.

Q. In connection with the sales work, did you or did not you engage in selling for the Rolley Company outside of the retail store?

A. Yes.

Q. Could you tell us when and where you served as a sales agent or employee of Mr. Rolley outside of the retail establishment?

A. Meier & Frank in Portland, Oregon.

Q. What was the nature of that business, briefly?

(Testimony of Vivian Rolley.)

A. We had a concession for selling Rolley Perfumes.

Q. That is in the City of Portland.

A. Yes.

Q. Where was this concession with regard to the store, what [271] floor and so on?

A. Well, it was over by the what was then the elevator and stairway section, and information desk, directly across from the hosiery department.

A. That was on the main floor, yes.

A. That was on the main floor?

Q. Did you have any display of Rolley products there?

A. Oh, yes; it was all Rolley.

Q. I beg your pardon?

A. Everything in that department was Rolley's.

Q. Did you display any Voodoo products there?

A. Yes.

Q. Did they bear the Voodoo label?

A. They certainly did.

Q. What year was that? A. '43.

Q. And did you continue that concession beyond 1943? A. Yes, 1943, 1944, 1945.

Q. Were you personally present at all times or were there other persons working there?

A. Oh, no, I was—I couldn't stay there all the time. We had other sales people.

Q. Do you recall when, if at all, the concession arrangement was terminated?

A. Yes. It was during the War when help was very difficult. [272] I had trained a girl who was

(Testimony of Vivian Rolley.)

excellent. She got married and started a family, so she had to terminate her services, so, why, at various times I would go up there and assist in training other girls, and it became quite a problem, and the situation at the shop wasn't too helpful or conducive to perfume sales. I mean, it just wasn't the proper setup there.

Q. In this concession there was nothing sold but Rolley products? A. That is right.

Q. Was that incorporated physically in the perfume department of the store?

A. No, it was far removed from it.

Q. The Meier & Frank establishment did have a perfume department, is that right?

A. Yes.

Q. Do you remember when you withdrew your concession department at Meier & Frank, as to year?

A. It was after some discussion of the advisability of keeping it there longer due to the situation there, the way the department was situated and the help situation.

Q. And at that time what, if anything, was done with regard to sale or not selling directly by Meier & Frank of Rolley products?

A. Well, it was all agreed they were to put the perfume into the regular department. [273]

Q. Do you recall what year that was done?

A. I think that is around 1945.

Q. And did Meier & Frank thereafter buy Rolley Perfumes?

(Testimony of Vivian Rolley.)

A. Yes. They have never been without it.

Q. After 1945 did they buy Voodoo products?

A. They have always bought it.

Mr. Hutchinson: You may cross examine.

Cross Examination

Mr. McKnight: Q. Mrs. Rolley, at Meier & Frank in Portland, you say you had a concession there?

A. Yes.

Q. Was that an arrangement whereby you acted as an independent operator, or were you part of the store?

A. Oh, part of the store. I mean—

Q. Did you keep the profits or did the store?

A. The store kept it.

Q. What was the name of the other sales person who sold the Rolley Perfumes in Meier & Frank?

A. Joy Lewis.

Q. Was that her maiden name? A. No.

Q. How do you spell Lewis? A. L-e-w-i-s.

Q. Do you know her present address?

A. She is in Denver, Colorado. The last time I knew, she was [274] working in a department store there, but I haven't heard from her or seen her, been in contact with her for about two years, I would say.

Q. Was it the Fisher Department Store in Denver? A. No, I don't know.

Q. What was her maiden name?

A. I am sorry.

(Testimony of Vivian Rolley.)

Q. Do you remember the name and the other numbers of perfumes that were being sold in 1935?

A. Yes.

Q. What, for instance?

A. No. 26 was Garden Pinks.

Q. What was 39?

A. 39 was a perfume, a blend. I don't know.

Q. What number did Forbidden Flame have?

A. Forbidden Flame? I don't know.

Q. Didn't you sell Forbidden Flame—

A. No.

Q. —at the Meier & Frank concession?

A. No.

Q. In 1935? A. I didn't, no.

Q. You didn't work for Mr. Rolley until 1943, is that true? A. That is right.

Q. In 1943, isn't that the time Mr. Rolley gave up the shoe [275] dye business? A. Yes.

Q. And devoted all his time to perfume?

A. That is right.

Q. What color was the label, the first Voodoo labels?

A. Gold with black printing.

Q. Have they always been the same as they are today?

A. No, there have been changes in the labels. They have always been gold with printing in black on them, but the material is a little different.

Q. Do you know who labels were obtained from prior to 1943?

A. No, I couldn't say. I didn't have any part of

(Testimony of Vivian Rolley.)

it, so I don't believe I would be able to tell you.

Q. You didn't make any sales of Voodoo perfume for Mr. Rolley prior to 1943, then?

A. No, I didn't.

Q. All you can testify to is that you saw some bottles around of Voodoo perfume? A. I did.

Q. Did you see the word Voodoo on the bottle?

A. I certainly did.

Q. Or was it like Exhibit J-1?

A. That is a stock bottle. That is not a perfume bottle, one that is for sale. That is a stock bottle.

Q. You haven't any of your original bottles of Voodoo perfume [276] with the trademark Voodoo appearing thereon, do you? A. Do I have?

Q. Yes. A. I have at home.

Q. But you haven't here this morning?

A. No.

Q. And you have no document here this morning to establish you sold Voodoo perfume any earlier than 1943, have you?

A. I am sorry, I didn't understand your question, please.

Q. Do you have anything in writing to show that you saw Voodoo or perfume bottles in Mr. Rolley's establishment prior to 1943?

A. No, I haven't anything written.

Q. Did you discuss this testimony prior to taking the stand with anyone?

A. Naturally, I did with my husband.

Q. You went over this matter with him, did you?

A. Yes, naturally.

(Testimony of Vivian Rolley.)

Q. Did he suggest any of the material that would be gone into?

A. He suggested only that I use my own memory and concentrate on it, which I have done.

Q. Do you consider the word Voodoo an oriental word?

A. Well, oriental, yes, I would think so.

Q. What connection does Voodoo have with the Orient? [277]

A. Well, I will tell you, I read a lot, and I read something when I was looking for a name and thinking we should have a name that was oriental, and I was reading something about Voodoo at that time. There was a tribe that practiced voodooism and that sort of thing, and it intrigued me.

Q. That isn't in the Orient, is it, Mrs. Rolley?

A. I wouldn't say whether—it had an oriental air to it, and that impressed me. That was my interpretation of the word.

Q. Do you know of any place where voodoo worship is indulged in in the Orient?

A. I am not an authority on that at all. The article I read was pertaining to that was so rather shocking to me, to my senses, whether it was written in truth or fiction or imagination or something, but that name appealed to me, and that was my interpretation of an oriental fragrance. I am not an authority.

Q. You don't associate Voodoo with voodoo worship on the Island Haiti in the Carribean?

A. I don't associate it, no.

(Testimony of Vivian Rolley.)

Q. What does Tabu mean to you?

A. Oh, something illegal, or——

Q. Did you sell Tabu perfume at H. Leibes when you were there in the perfume department?

A. I don't know. [278]

Q. You have never heard of Tabu?

A. I have, yes.

Q. Wouldn't you say it was one of the world's most prominent perfumes?

Mr. Hutchinson: If the Court please, I think puffing the plaintiff's product, the witness I don't think should have——

A. (interposing) I could answer that. I think it is a matter of opinion.

Mr. McKnight: Q. I didn't hear you.

A. I think that is a matter of opinion.

Q. When did you first hear of Tabu perfume?

A. Oh, I would say it was about twelve to fifteen years ago, roughly speaking.

Q. That would be sometime in the late '30s?

A. Oh, yes.

Mr. McKnight: That is all.

Mr. Hutchinson: That is all, thank you very much, unless the Court has a question.

The Court: That is all.

[Endorsed]: Filed Dec. 14, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Proceedings on Motion for New Trial

Friday, April 11, 1952

Mr. Hutchinson: I am J. Albert Hutchinson, one of counsel of record for the defendant and cross-complainant, Rolley, Inc. Other counsel of record are Joseph A. Brown and Harry Gottesfeld.

Mr. MacKay: William G. MacKay for the plaintiff.

Mr. Hutchinson: This is a motion for new trial after judgment in favor of the plaintiff and cross-defendant. The case, as the Court will recall, involved the ownership of the trademark and trade name Voodoo as relating to cosmetic products, particularly perfume and toilet water and similar items used for cosmetic purposes.

(Oral arguments omitted upon request of counsel.)

Mr. Hutchinson: There is only one other point to which I will call Your Honor's attention, and that is on the question of whether the defendant and cross-complainant should be required to deliver its property to plaintiff as the judgment now provides.

The Court: What property?

Mr. Hutchinson: The judgment reads: "That the defendant deliver up to plaintiff's counsel all labels, signs, prints, advertising leaflets, catalogs, price lists, packages, wrappers, receptacles and other

things, and all plates, molds and other devices for making the same, in the possession or under the control of the defendant which unlawfully bear the designation Voodoo.”

The Court: It has nothing to do with the product he produces. It is only the label.

Mr. Hutchinson: I don't know what "other things" means, Your Honor.

The Court: That is all that was intended, is it not?

Mr. McKay: That is right, Your Honor. It is the usual provision.

The Court: Let me say kindly to you that I was in complete sympathy with your client, starting at a shoe stand up there, and he had some ability and developed this perfume, but he clearly violated the law.

Mr. Hutchinson: With respect to Voodoo, Your Honor.

The Court: Yes.

Mr. Hutchinson: In what manner, sir?

The Court: You are familiar with the record?

Mr. Hutchinson: Yes I am.

The Court: I say that kindly. I was trying to find a way to help him sympathetically, which has no place in the law.

Mr. Hutchinson: It equity, I think, Your Honor; not sympathy, to be sure.

The Court: I make that statement to you so that you may have some record on it. I have re-hashed this case in the manner you suggest. It has been gone over. I will hear from counsel.

Mr. McKay: Your Honor, I am appear, as you know, as local counsel in this case. My associate, Mr. McKnight of Chicago, sent in a brief which we took the liberty of filing, and he instructed me to rely on his brief. So unless Your Honor had some questions——?

The Court: No question in my mind. Now, I hope if this case goes forward you prevail. It won't hurt my pride the least bit. Motion will have to be denied.

Mr. Hutchinson: Thank you, Your Honor.

* * * * *

[Endorsed]: Filed May 16, 1952.

[Endorsed]: No. 13389. United States Court of Appeals for the Ninth Circuit. Rolley, Inc., Appellant, vs James L. Younghusband and Howard Younghusband, co-partners, doing business as Consolidated Cosmetics and Les Perfums de Dana, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 20, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Judicial Circuit

Civil Action No. 13,389

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics, and Les Par-
fums de Dana, Inc., Plaintiffs,

vs.

ROLLEY, INC., Defendant.

ROLLEY, INC., Cross-Complainant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing busi-
ness as Consolidated Cosmetics, and Les Par-
fums de Dana, Inc., Cross-Defendants.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION

To the Honorable Paul P. O'Brien, Clerk, United
States Court of Appeals, in and for the Ninth
Judicial Circuit:

Pursuant to rule 19, Rules of the United States
Court of Appeals of the Ninth Circuit, and rule 75,
Rules of Procedure of the Supreme Court of the
United States, appellant respectfully submits here-
with its statement of the points on which appellant
intends to rely on upon said appeal and the designa-
tion of the record which is material to the considera-
tion of the appeal.

Appellant's Statement of Points to Be
Relied Upon on Appeal

The points on which appellant intends to rely may be concisely stated as follows:

I.

The evidence is insufficient to justify the judgment, including, but not limited to, findings respectively numbered 3, 4, 5 and 6;

II.

The judgment is contrary to the evidence, including, but not limited to, the findings thereof respectively numbered 3, 4, 5 and 6;

III.

The judgment is contrary to law and equity, and more particularly in that it declares valid and protectible by injunctive process a trade name and mark resting entirely upon registration with appropriate agencies of the United States of America—where (1) there is no evidence of actual use of the trade name and mark; (2) there is no evidence of pretended use of the trade name and mark for more than four years after registration; (3) such a pretended use for less than two years was voluntarily abandoned for more than three and one-half years; and (4) appellant's lawful appropriation and extensive, open, notorious and continuous use of the trade name and mark continued for more than five years prior to the commencement of the action and such trade name was acquired from appellant's predeces-

sor in interest after a prior use of more than three years;

IV.

Appellant was prevented from having a fair trial by errors, including, but not limited to: (1) the presentation and receipt of evidence respecting asserted conduct by appellant's predecessor in interest, relating to (a) other and unrelated trade names and marks asserted by Appellees and (b) asserted trade names and marks not owned or claimed by any party, or any predecessor in interest of any party, to the action; (2) the overruling of appellant's timely and valid objections to the offering and receipt of such evidence; and (3) the denial of appellant's timely and appropriate motion to strike said evidence;

V.

The judgment and decree includes unnecessary and mischievous recitals of purported fact, including, but not limited to, those set forth in paragraphs 7 and 8 of the findings therein, which are also contrary to the evidence in that such evidence establishes: (1) that neither appellant nor its predecessor in interest has ever used any of the trade names or marks set forth in paragraph 7 of said findings; (2) that the appropriation and use of the trade name and mark Forbidden Flame was, in fact, adopted and used by appellant's predecessor in interest prior to any asserted registration or use of the trade name and mark Forbidden Flame referred to therein; and (3) appellant has not at any time used any of the names, or any name bearing

any resemblance to any of the names, set forth in paragraphs 7 and 8 of said findings;

VI.

The conclusions of law in paragraphs 9 through 12 set forth in said decree are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VII.

The provisions of paragraphs 13 through 14 are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VIII.

The judgment and decree erroneously provides for the imposition of costs upon the appellant, whereas a substantial and major portion of the relief sought by appellee has been denied appellees and a major portion of such costs relate to issues as to which such relief will have been so denied;

IX.

The Court erroneously denied appellant's motion for a new trial.

Designation of Material Portions of
The Record on Appeal

Appellant hereby designates the material portions of the record on appeal on which appellant intends to reply, to be made up and printed, as follows, **namely:**

I.

Appellees' complaint, excepting the prayer and verification, commencing with line 8, page 4;

II.

Appellant's answer and cross-complaint, excepting the prayer and verification, commencing with line 11, page 9;

III.

Appellees' answer to appellant's answer and cross-complaint, except the prayer and verification, commencing with line 11, page 5.

IV.

Order of the Court adding *Les Parfums de Dana, Inc.*, as a party defendant;

V.

Judgment;

VI.

Appellant's motion for a new trial;

VII.

Writ of injunction;

VIII.

Reporter's transcript of testimony and oral proceedings, objections, motions and rulings of the Court, appearing in the Reporter's transcript of the proceedings for the 14th, 15th and 16th days of November, 1951, commencing and concluding at the following pages and lines, inclusive, of Reporter's transcript of the proceedings on said dates, namely;

* * * * *

IX.

Reporter's transcript of oral proceedings on motion for new trial, appearing in the Reporter's transcript of the proceedings for the 11th day of April, 1952, commencing and concluding at the following pages and lines, inclusive, of Reporter's transcript of the proceedings on said date, namely: Page 2, Line 1, through Page 4, Line 7.

Respectfully submitted:

HARRY GOTTESFELD,

JOSEPH A. BROWN,

HUTCHINSON & QUATTRIN

/s/ By J. ALBERT HUTCHINSON

Attorneys for Defendant, Cross-Complainant and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jun. 10, 1952. Paul P. O'Brien Clerk.

—

[Title of U. S. Court of Appeals and Cause.]

PLAINTIFFS-APPELLEES' ADDITIONAL
DESIGNATION OF RECORD

In accordance with Rule 19 of this Court, plaintiffs-appellees designate the following additional parts of the record which they think material to the consideration of the appeal and request that the same be printed as part of the same record.

1. The balance of the complaint beginning with page 4 line 9 through to the end on page 6.

2. The balance of plaintiffs' answer to defendant's cross complaint beginning with page 5 line 11 through to the end of page 5.

3. Defendant's motion for leave to file cross complaint and bring in additional parties, and order thereon of June 7, 1950.

4. Plaintiffs' motion for preliminary injunction.

5. Affidavit of John D. Gaumer in support of plaintiffs' motion for preliminary injunction.

6. Injunction order of December 28, 1950.

7. Plaintiffs' response to defendant's motion for a new trial.

8. Order of April 15, 1952, denying motion for a new trial.

9. Copy of the additional designation.

10. The following additional portions of the Official Reporter's Transcript for the proceedings in the District Court on November 14, 15 and 16, 1951, commencing and concluding at the following pages and lines thereof:

* * * * *

/s/ JAMES R. McKNIGHT

/s/ WILLIAM G. MacKAY

Attorneys for Plaintiffs-
Appellees.

Acknowledgment of Service attached.

[Endorsed]: Filed June 16, 1952.

No. 13,389

United States Court of Appeals
For the Ninth Circuit

ROLLEY, INC.,

Appellant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing
business as Consolidated Cosmetics
and Les Parfums de Dana, Inc.,

Appellees.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

HARRY GOTTESFELD,

JOSEPH A. BROWN,

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**United States Court of Appeals
For the Ninth Circuit**

ROLLEY, INC.,

Appellant,

VS.

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing
business as Consolidated Cosmetics
and Les Parfums de Dana, Inc.,

Appellees.

**Appeal from the United States District Court for the Northern
District of California, Southern Division.**

APPELLANT'S OPENING BRIEF.

PART ONE: PRELIMINARY STATEMENT.

This is an appeal from judgment and perpetual injunction of the United States District Court, Northern District of California, in favor of plaintiffs-appellees and against appellant, defendant and cross-complainant below, enjoining the appellant from using an unregistered trade name and mark VOODOO appropriated by its predecessor in interest in the year 1934 and thereafter continuously used by appellant and its predecessor upon and as a distinguishing mark for a scent or perfume in cosmetic products manufactured and sold by them within the States of California,

Washington, Oregon, and Nevada, the District of Columbia, and Territories of Alaska and Hawaii.

Appellees' predecessors secured an unopposed registration with appropriate agencies of the United States in the year 1939, a second registration with such agencies in the year 1946, and with those of the State of California in the year 1950 of the same name and mark, making token sales of nominal amounts of their products under the name and mark in the year 1944 and their first merchandising of products under the name and mark in the year 1949.

Upon appellant's discovery of advertising by appellees under the name in the year 1949, further use of the name was protested by appellant and appellees instituted the action below seeking an injunction. Appellant filed a cross-complaint seeking an injunction and accounting upon appellees' infringement.

Judgment was entered after a plenary trial and hearing; the evidence is without substantial conflict; and the principal question of substantive law presented by this appeal may be stated as follows:

Is not the owner of a trade name and unregistered trade-mark, appropriated in the year 1934 and thereafter continuously used in actual merchandising of the owner's products identified with such name and mark, entitled to judicial relief as against an infringer claiming appropriation in 1938, Federal registration in 1939 and California registration in 1950?

The rationale of decision below is that the asserted misuse by appellant's predecessor in interest of trade-marks of third persons, unrelated to any party to

the action, prior to the year 1943 required injunctive relief to appellees, the Court stating (on the motion for new trial) in part as follows:

“The Court. Let me say kindly to you that I was in complete sympathy with your client, starting at a shoe stand up there, and he had some ability and developed this perfume, but he clearly violated the law.”

Mr. Hutchinson. With respect to Voodoo, Your Honor?

The Court. Yes.

Mr. Hutchinson. In what manner, sir?

The Court. You are familiar with the record?

Mr. Hutchinson. Yes, I am.

The Court. I say that kindly. I was trying to find a way to help him sympathetically, which has no place in the law.

Mr. Hutchinson. In equity, I think, Your Honor; not sympathy, to be sure.

The Court. I make that statement to you so that you may have some record on it. I have re-hashed this case in the manner your suggest. It has been gone over. I will hear from counsel.”

* * * * *

“The Court. No question in my mind. Now, I hope if this case goes forward you prevail. It won't hurt my pride the least bit. Motion will have to be denied.” (Transcript of Record, pages 282-283.)

References herein are as follows:

| | |
|-----------------------|----|
| Transcript of Record | TR |
| Plaintiffs' exhibits* | PX |
| Defendant's exhibits | DX |

*By stipulation, the physical evidence has been brought forward in original form.

Unless otherwise indicated, emphasis, omissions and insertions in quotations are supplied by the writer.

**PART TWO: STATEMENT AS TO JURISDICTION
AND OF THE CASE.**

I.

STATEMENT AS TO JURISDICTION.

Jurisdiction of the District Court was invoked under Title 28, United States Code, reading in part:

“Sec. 1332.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States; * * *”.

and

“Sec. 1338.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws.”

upon the allegations of the complaint, reading as follows (TR 3-4):

“1. Plaintiff, James L. Younghusband and Howard Younghusband, both residents and inhabitants

of the State of Illinois, * * * complains against Rolley, Inc., a corporation organized and existing under the laws of the State of California and having its principal place of business at San Francisco, California, a resident and inhabitant of the State of California * * *

2. This is an action under the trade mark laws of the United States and between citizens of different states, in which the amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00”

which allegations were admitted in the answer and cross-complaint (TR 11 and 17) and found to be true by the District Court in the judgment (TR 42-44).

The jurisdiction of this Court has been invoked under Title 28, United States Code, reading:

“Sec. 1291. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

by the timely taking and perfection of an appeal from a final judgment and writ of injunction based upon the facts and subject matter alleged and found as above set forth.

II.

STATEMENT OF THE CASE.**A. THE QUESTIONS PRESENTED.**

Upon the whole record, the following reversible errors appear, namely:

1. The judgment would erroneously protect an asserted trade-mark resting entirely upon registration, in 1939, and would deny relief to the owner of an unregistered trade-mark lawfully appropriated in 1934 and lawfully and continuously used in merchandising from that date to the date of judgment;

2. The findings and conclusions of ownership of the trade-mark in appellees are contrary to all the evidence and to controlling substantive law;

3. Appellant was denied the opportunity of a fair trial by irregularities in the proceedings in that, over timely and adequate objection, appellees were permitted to introduce evidence upon the following matters, to-wit:

(a) trade-marks neither claimed nor used by appellant or its predecessor;

(b) asserted wrongdoing of appellant's predecessors with respect to third persons not related to any party, or any predecessor of any party, to the action;

(c) asserted wrongdoing of appellant's predecessor claimed with respect to subject-matter unrelated to any property, right or claim asserted by any party to the action; and

(d) asserted wrongdoing having occurred more than seven years prior to commencement of the action.

4. Appellant's motion for a new trial was erroneously denied for each of the foregoing reasons.

B. SUMMARY OF THE RECORD.

1. RELATIVE TO THE SUBSTANTIVE QUESTION.

Since it cannot be disputed that the record, in the light of the applicable common law and statutes and registration legislation set out in Part Three: Argument, *infra* herein, presented the single substantive issue of first appropriation and use of the trade-mark VOODOO as between the respective parties, we summarize these portions of the record pertinent to that issue.

The Evidence.

The unchallenged and undisputed evidence on this issue demonstrates the factual situation following.

Appellees have variously engaged in a considerable traffic in the registration and transfer of trade-marks referable to perfumes and cosmetics (TR 73-88) and appellee Dana has, since sometime during or subsequent to the year 1948, advertised and merchandised¹ such products under the trade-mark VOODOO (TR 89-91 and 93-95; PX 22, 23, 42 through 84).

¹Apparently, the original plaintiffs in this action had no interest or right in its subject matter at the date of its commencement, Dana having theretofore acquired all rights therein. (See PX 16 and TR 87-89 and 97.)

Appellant raised no issue as to the fact of registration of VOODOO by appellees' predecessors, devolution of title to the certificate of registration and ownership by appellees of such rights as registration alone may have conferred, but specifically reserved the issues of bona fide use prior to appellant's appropriation and use of the trade-mark VOODOO and specifically reserving the objection that registration did not confer ownership of the trade-mark (TR 80-81).

Appellees' first registration of VOODOO as a trade-mark (number 363,746) was issued on January 3, 1939, and republished on August 9, 1949 (TR 80-81, PX 8) and claimed appropriation on September 10, 1938.² As the registrations were unopposed, the evidential showing, if any, in support does not appear.

There is no evidence of appropriation or of any use of the trade-mark VOODOO by appellees until May 30, 1944 (TR 97). These sales number two purported sales of the latter date, mailed to one person each in the States of New York and California of nominal quantities and value (PX 85). The next sales were: one on August 22, 1944, to the California consignee of one dram of perfume; one in 1945 and, in 1946, two nominal mailings to the same California recipient, one Terrill, of South Pasadena, California (PX 85). Whether such mailings were solicited does

²Appellees are precluded from claiming appropriation of VOODOO prior to the date claimed in the application for registration. *Walgreen Drug Stores v. Obear-Nestor Glass Co.*, 113 Fed. (2d) 956, certiorari denied, 311 U.S. 708 and 730.

not appear. No advertising or catalogue or price list references to VOODOO at this time was produced.

The first advertising of VOODOO by appellees relates to the years 1949 and subsequent periods (PX 44 through 48).

The first bona fide merchandising³ of appellees' products under the VOODOO trade-mark occurred in 1949 (PX 95).

Appellees' advertising and sale of its products under the trade-mark VOODOO first came to the attention of appellant in late 1949 (TR 171-173) whereupon its use was protested in writing (TR 173-177; DX B through Q).

Appellant was incorporated on April 30, 1946, and thereupon purchased the good will, accounts, stock in trade, trade-marks, including VOODOO, names and other properties of Charles A. Rolley, then doing business as Rolley Perfumes, and thereafter engaged in the manufacture and sale at wholesale and retail of perfumes and cosmetics at San Francisco and throughout the States of California, Washington and Oregon, the District of Columbia and the Territories of Hawaii and Alaska and to a limited extent elsewhere (TR 156, 170-171; 183-184; 215-217).

Mr. Charles A. Rolley, appellant's assignor, undertook the compounding of perfume in 1933 (TR 161-163). The first such operation was the experimental

³The "made" sales of 1944-1946 must be disregarded, as intended for "laying a basis" for application for registration.

See:

Phillips v. Hudnut, 263 Fed. 643, 644.

preparation of original and unnamed compounds prepared by him as Christmas presents to receptionists, cashiers, and sales persons who had favored Mr. Rolley by referring persons to him as customers in his newly-started service business of dyeing, restoring and cleaning of shoes, leather and suede wearing apparel, and the like (TR 161). Such experimental efforts having been well and encouragingly received (TR 161-162), Mr. Rolley determined to undertake compounding of perfumes upon a larger scale for the purposes of sale. This occurred in early 1934 and continued until the transfer of his perfume and cosmetic business to cross-complainant in 1946 (TR 162; 169-171). Meanwhile, and during the late 1930's, the volume of his cosmetic business had increased to equal or exceed his dyeing business (TR 189), and by 1943 he had withdrawn from all other business activities and devoted his full time, as well as that of all his employees, to the preparation and vending of perfumes, scents, colognes, and other cosmetics (TR 169-170). Until the beginning of the year 1943, all cosmetic sales were at retail for cash in his retail establishment maintained in downtown San Francisco (TR 169). From 1943 onward, extensive wholesale operations were conducted in addition to, and in conjunction with, such retail stores. Purchase orders and invoices relating to such wholesale activity were received as defendant's Exhibits "A-1 through D-1" and "X through Z" (TR 183-194). As no credit operations were carried on in the retail business and current "sales slips" had been destroyed before appellees' in-

fringements were discovered (in 1949) detailed records of the items sold are, naturally, not available for the years 1934-1943 (TR 179-181).

The evidence of Mr. Rolley's appropriation and use of the name and trade-mark VOODOO on cosmetics in 1934 and consistently thereafter is extensive, detailed and unchallenged.

The name was suggested to him by Mrs. Rolley, his wife. Her testimony is in part (TR 267-268; 270-274):

"Q. I call your attention to the name VOO-DOO, and I will ask you if you at any time had any discussion with Mr. Rolley regarding that name as a name for perfume?

A. I certainly did. I was the one that suggested the name to him.

Q. Do you recall approximately when you suggested it to him?

A. Well, I would say that it was about a year after he had made his first perfumes."

* * * * *

"Q. Will you tell us briefly what you observed with regard to the name VOODOO?

A. Well, I saw the bottle as a finished package, with the contents in the bottle, and I saw the label and I also saw the labels before they were put on the bottle."

* * * * *

"Q. I have here a container bearing No. 54, and I will ask you to examine it and state what it is, if you know?

A. Yes, I remember it well. It is the original VOODOO, No. 54."

* * * * *

“Q. How long, if you know, was it in your home?”

A. Well, I have had it for quite some time. I would say that that product is about, or that bottle is about sixteen, eighteen years old.”

* * * * *

“Q. Did you see any in his place of business bearing that label in the year 1934?”

A. Yes.

Q. And is the same true or not true with regard to the year 1935?”

A. Yes.

Q. Is your answer the same with regard to the years 1936, 1937, 1938, 1939 and 1940?”

A. That is right. We have always had it.”

* * * * *

“Q. Did you have any display of Rolley products there [Mier and Franks, Portland, Oregon]?”

* * * * *

“A. Everything in that department was Rolley’s.

Q. Did you display any VOODOO products there?”

A. Yes.

Q. Did they bear the VOODOO LABEL?”

A. They certainly did.

Q. What year was that?”

A. ’43.

Q. And did you continue that concession beyond 1943?”

A. Yes, 1943, 1944, 1945.”

Mr. Moreland a manufacturers’ agent for essential oils in San Francisco, who assisted Mr. Rolley in acquiring the latter’s original supply of raw mate-

rials for perfume in 1933-1934 testified, in part (TR 227):

“Q. With reference to that period, say, 1935, 1936, earlier than that do you recall any particular name?”

A. And it was about that time, I think, there was quite a lot of talk about some Voodooism down in Porto Rico, somewheres around in there, and so I remember he had the name ‘VOODOO’, and I couldn’t understand what the dickens relation the name ‘VOODOO’ had to perfume but it wasn’t any of my business * * *”

Miss Homilius a tenant of the same building (212 Stockton Street) with Mr. Rolley, in 1933 and subsequently, testified with regard to the appropriation and use of the name and mark VOODOO in part as follows (TR 240-242, 245):

“Q. Do you recall when you first became acquainted with him?”

A. Oh, it would be back in 1932.”

* * * * *

“Q. Do you recall any of the names of the earlier products he used?”

A. Yes, I think I do. One is VOODOO.

Q. When do you recall first having seen or heard the use of VOODOO in connection with any of his perfumery products?”

A. Well, it was shortly after that, after 1933 or something like that.

Q. In other words, rather shortly after you had become acquainted with him?”

A. That is right.”

* * * * *

“Q. To the best of your recollection, then, you think VOODOO was used about 1933 to 1934?”

A. That’s right.”

* * * * *

“Q. In your discussions with Mr. Rolley of names of perfumes, did you ever discuss with him the name VOODOO, make any comment on it?”

A. Yes, I did, because I wanted to know the origination of the name. In fact, I called the word ‘HOODOO’.”

Mrs. Lobhard (Nee’ Menth) a designer and maker of suede and leather clothing and costumes, associated with Mr. Rolley and a joint user of the same business location from 1939 until 1941 and selling perfume for him on occasion during that period, testified to Mr. Rolley’s then use of VOODOO as a name and mark, in part (TR 236):

“Q. Calling your attention to the name VOODOO, did you see or hear or observe the name, notice the use of VOODOO during that same period you knew Mr. Rolley’s perfume?”

A. Yes, I remember it. He told me he had that name, and I could see no connection with it in regard to perfume. That is the reason I remember the name.”

Mrs. Anis, who was employed by Mr. Rolley from 1940 until the incorporation of appellant and thereafter to the present time by it, testified in part (TR 251-252; 254-257):

“Q. When did you first start to work for him?”

A. February or March 1940.”

* * * * *

“Q. At that time did you observe any product that was designated as VOODOO or by the name VOODOO?”

A. Yes.”

* * * * *

“Q. Will you state what, if anything, you observed, Mrs. Anis, with regard to bottles of any nature bearing any label making reference to VOODOO?”

A. We had some VOODOO strips, the old style which came in strips about one half by four, about twelve or fifteen names, horizontal, instead of the individual pieces we have now.”

* * * * *

“Q. And at that time was there any wholesale business conducted by Mr. Rolley?”

A. Yes.”

* * * * *

“The Court. In what year?”

A. It must have been '42, 1942.

The Court. 1942?”

* * * * *

“Q. At that time do you recall the use of VOODOO as a name for perfumes in connection with Mr. Rolley's business?”

A. Yes.”

* * * * *

“Q. Did you personally at any of these times sell any VOODOO products?”

A. Yes.”

* * * * *

“The Court. When did you sell these VOODOO products?”

* * * * *

“The Court. Just a minute. You will have to try to fix the time as near as you can.

A. Oh, Christmas, '42.

The Court. 1942?"

* * * * *

"Q. From that time on did you continue to sell VOODOO products for Mr. Rolley or subsequently the Rolley Company?

A. Excuse me, sir, I wasn't strictly a sales person, so I could say that I sold it continuously.

Q. I understand. You did so from time to time?

A. Yes."

* * * * *

This witness also identified VOODOO labels on hand and used in 1942, those used later, invoices and purchase orders for wholesale accounts referring to VOODOO and to stock "54" used for VOODOO and similar documentary evidence above noted.

Mrs. Wiggby, one of Mr. Rolley's customers [1942] testified in part (TR 246-247).

"Q. Calling your attention to the name VOODOO, did you see that displayed at that time in conjunction with any of his perfume products?

A. Yes.

Q. Did you personally purchase that commodity?

A. Yes, I did."

* * * * *

"Q. In shopping for other friends, rather, your friends that you would shop for, did you purchase VOODOO products for them?

A. Yes."

Mr. Rolley testified fully to his appropriation of the name and mark VOODOO in 1934 and continued

use thereafter until his assignment to cross-complainant and by it thereafter, first in his discovery deposition (TR 112-154) secondly, on direct examination (TR 156-194, 265-266) and finally on cross-examination (TR 186-221) without challenge or conflict. His testimony in the discovery deposition (offered by appellees) (TR 126, 132, 139, 140, 145) is in part:

“Q. Now, when did you first use the trademark VOODOO on or in connection with perfumes or colognes?

A. Some time in 1935 and possibly 1934.

Q. About what date?

A. I don't recall the exact date now. It was some time in the summer of—1934 or 1935.”

* * * * *

“Q. When did you first sell VOODOO perfume to any store?

A. 1943.

Q. Prior to 1943 you confined your sale of VOODOO perfume to those who purchased it for their own use?

A. I confined all my perfume business to those that used it for their own use.”

* * * * *

“Q. Now, have most of your sales of VOODOO perfume and cologne been in San Francisco and California?

A. Recently the biggest percentage of it has been, yes.”

* * * * *

“Q. Well, now, in the past—

A. Not a few years ago it wasn't. A few years ago we sold more VOODOO perfume wholesale throughout parts of the United States than we did retail.

Q. Now, what other places that you sold VOO-DOO perfume than Seattle, Washington?

A. Seattle, Washington; Honolulu, Hawaii; Sacramento, California; Washington, D. C.; Alaska; Oakland.”

* * * * *

“Q. So that any rights that you claim to the trade-mark VOODOO are not based on registration of any name?

A. It is based on usage.”

The documentary and other physical evidence demonstrates the appropriation of the trade-mark VOO-DOO in 1934 by appellant's predecessor and continuous use in merchandising thereafter.

The Pleadings.

On May 8, 1950, appellees commenced the instant action for an accounting and injunctive relief for asserted infringement of their registered trade-marks: TABU, FORBIDDEN and VOODOO; alleging ownership in general terms and registration under acts of the Congress to their predecessors in interest (TR 3-4).

Appellees made no assertion of the dates of appropriation of any trade-mark, stating advertising and sale “for many years” with distinction among them (TR 4-5).

Appellees further alleged use of all described trade-marks by appellant in conjunction with the latter's products of the same general descriptive properties and declared that by such use appellant “wantonly

and wrongfully committed the acts of trade-mark infringement and unfair competition herein complained of" (TR 5-6).

Appellant filed its answer and cross-complaint (TR 11-21) raising issue as to all allegations of the complaint to the extent the same related to the trade-mark VOODOO and asserted appropriation and continuous use by appellant and its predecessor in interest prior to appellees' appropriation and that appellees' registration was unlawful (TR 12-16).

Appellant expressly disclaimed any right or claim in any other trade-mark described in the complaint and denied any use of such other trade-marks (TR 13-14).

By its cross-complaint (TR 16-22), appellant alleged appropriation of the trade-mark VOODOO by its predecessor in interest in 1934⁴ and continuous use thereafter throughout the States of California, Oregon and Washington and the District of Columbia in merchandising cosmetic products of its manufacture (TR 16-17).

The cross-complaint set forth appellant's ownership of the VOODOO trade-mark and its infringement and unfair competition by means of such infringement by appellees and others collaborating with them (TR 17-20).

Appellees by answer raised issues as to the material averments of the cross-complaint (TR 34-39).

⁴This date was substituted for that appearing in the pleading, as filed, by leave of Court before trial (TR 71-72).

The Judgment.

The judgment (TR 42-47) consists of (1) findings of fact, (2) conclusions of law and (3) decree, or order, for an injunction, but omitted award of damages or order for an accounting.

The findings (prepared by appellees) expressly abandon claims of infringement or unfair competition with respect to any trade-mark other than VOODOO (TR 43-44).

It is further found that:

“3. Plaintiff Les Parfums de Dana, Inc., has adopted and used, is now using and is the sole and lawful owner of the trade mark Voodoo for perfumes, colognes and other cosmetics and registration No. 363,746 of January 3, 1939, therefore issued by the United States Patent Office on said date, and is the successor to plaintiffs James L. Younghusband and Howard Younghusband doing business as Consolidated Cosmetics, who were the owners of the said trade mark Voodoo at the time of the filing of the complaint herein.”

* * * * *

“5. Said defendant Rolley, Inc., has at dates later than the first use of the trade mark Voodoo by plaintiffs and without plaintiffs' consent used the trade mark Voodoo on and in connection with the sale of perfume and toilet water, which were not products of plaintiffs.” (TR 42-43.)

The conclusions of law include the following declarations, namely:

“10. The trade mark Voodoo used by plaintiff Les Parfums de Dana, Inc., on perfumes, colognes and other cosmetics and registration No. 363,746

therefor issued by the United States Patent Office and owned by said plaintiff is good and valid in law.

11. Said defendant, Rolley, Inc., has infringed plaintiffs' said registered trade mark Voodoo by the use of the Voodoo trade mark on and in connection with the offering for sale and the sale of perfume and toilet water not originating with plaintiffs and without plaintiffs' consent, and said defendant has engaged in unfair competition with plaintiffs in offering for sale and selling perfume and toilet water as and for Voodoo, which did not originate with plaintiff.

12. Plaintiffs are entitled to a permanent injunction against said defendant to restrain said trade mark infringement and unfair competition." (TR 44-45.)

There is no finding of the date of appropriation or first use of the trade-mark VOODOO by (1) appellees' predecessors or (2) appellant's predecessor.

2. RELATIVE TO THE PROCEDURAL QUESTIONS.

Appellant was denied the opportunity for a fair trial by the erroneous admission of evidence relating to the trade-mark TABU and the variant, Forbidden, not claimed or used by appellant, and to some 29 other trade-marks of other persons, not related to any trade-mark, product or party embraced in this action and neither claimed nor used by appellant. That such inadmissible material was prejudicial is demonstrated by the candid statement of the Court that appellees should recover and appellant should be de-

nied relief only because "he clearly violated the law", (TR 282).

There simply was no issue respecting any trade-mark other than VOODOO.

(a) The trade-mark "TABU" and its variant "FORBIDDEN".

In its answer and cross-complaint (TR 11-12) appellant made no claim to any property or right in the trade-marks TABU and FORBIDDEN and restricted its denials, as well as its affirmative averments, to the trade-mark VOODOO (TR 16-21).

In appellant's opening statement, the Court was particularly advised that no issue was presented as to TABU and FORBIDDEN, in part (TR 68-69):

"Counsel has suggested that there is involved here some issue as to TABU and some variants, and FORBIDDEN. That is not the case. The cross complainant and defendant makes no claim to TABU as a trademark or name for perfume, and has not at any time during the case, and has not at any time sold any perfume whatever under the name TABU or any of its variants.

"The use of FORBIDDEN FLAME was made by Mr. Rolley prior to the incorporation of this company, so it has not been used for many years, long since the statute of limitations, assuming it did infringe, which we believe it does not. In other words, FORBIDDEN FLAME on a perfume is as much different from TABU, described as a forbidden property, as any other trade-mark. However, we call attention to the fact it has not been used in many years by anybody connected

with the cross-complainant, and it is not in issue, and merely clutters the record to drag it in.”

At the first offer of evidence respecting TABU, appellant specifically objected to the introduction of the evidence relating to that trade-mark, the offer, objection and ruling being as follows (TR 75):

“Mr. McKnight. Your Honor, at this time I would like to substitute as Exhibit 2 a certified copy for the soft copy that was offered in evidence. Is that satisfactory? Subject to correction if error should appear.

Mr. Hutchinson. Yes. With the exception that this relates, your Honor to TABU and we object on the ground it is incompetent, irrelevant and immaterial and without any issue in this case.

Mr. McKnight. In other words, he is objecting on the merits, which will have to be later determined after your Honor hears the evidence in the case. I merely want to substitute a certified copy for the soft copy.

Mr. Hutchinson. No objection on that ground, your Honor.

The Court. Let it be admitted and marked.”

It was thereafter stipulated that the objection to evidence relating to TABU was subject to the same objection by appellant without repetition. The offer, stipulation and ruling of the Court are as follows (TR 77):

“Mr. McKnight. I now would like to offer a certified copy in place of the soft copy of Registration No. 426,323, subject to the same objection.

Mr. Hutchinson. Can it be understood all these references to TABU and FORBIDDEN in the various exhibits will be offered by you, no objection made to the foundation, reserving the right for cross plaintiff's objection on competency and the issues point earlier made, and that will be to all of these?

Mr. McKnight. That may be understood without repetition.

The Court. Let the record so show."

In submitting the judgment to the Court, appellees themselves abandoned any claim to infringement or other cause of action with relation to TABU and FORBIDDEN, including only the reference reading (except for dates and numbers) as follows (TR 43-44):

"7. Plaintiffs James L. Younghusband and Howard Younghusband doing business as Consolidated Cosmetics have adopted and used, are now using and are the sole and lawful owners of the trade-marks TABU, TABOO and FORBIDDEN for perfumes, colognes and other cosmetics and registrations * * *

8. The defendant having abandoned the trade-mark FORBIDDEN FLAME and discontinued its use, there is no need for any further finding of fact or order thereon."

The expansion of the record by repeated references to trade-marks as to which neither right nor infringement was claimed by the respective parties vastly extended the hearing, was intended to create, and

necessarily created, the impression of wrongdoing on the part of appellant's predecessor in interest.

(b) The references to unrelated trade-marks of third persons.

Evidence relating to some 29 trade-marks concededly belonging to third persons was received over timely and adequate objection by appellant.

Upon the offer of the deposition of appellees' only witness (Gaumer, TR 72-108) to their exhibits and to the offer of the discovery deposition (TR 111-153) of Mr. Rolley, appellant specifically objected to all those portions thereof relating to trade names and products of third persons and unrelated to the parties and their privies and upon the further ground that any asserted use of any trade-mark referred to therein, other than VODOO, antedated the filing of the action by more than any applicable period of limitations.

These objections and rulings are as follows (TR 108-110; and 153-154):

"Mr. McKnight. I now offer in evidence Exhibits 1 to 100.

The Court. They may be admitted and marked next in order.

Mr. Hutchinson. Subject to the running objection?

The Court. Yes.

* * * * *

Mr. McKnight. I will offer this [Gaumer] deposition also in evidence, together with Exhibits 2 to 100, inclusive.

The Court. Let them be admitted and marked.

* * * * *

Mr. Hutchinson. To the offer of the deposition and to the exhibits as incorporated therein, we wish to object to certain parts in addition to the other objections we have now pending.

First, we would like to object to the receipt of any information where evidence or opinion of the witness with respect to TABU and its variants, and to FORBIDDEN, for the reasons I outlined earlier, namely, it isn't an issue; that those names, TABU, particularly, and variants, have never been used; FORBIDDEN has never been used, and the use of FORBIDDEN FLAME is so far back that the statute of limitations and laches would bar it anyway. No claim is made to it, and therefore I think that it is a very well taken objection.

* * * * *

With regard to the opinion of this witness that the names of these various perfumes as used by specific parties, FORBIDDEN FLAME, and so on, I think should be refused with regard to our main objection. If not, then we make further objection that he is not qualified, nor is any attempt to qualify him made, that he is in a position to give an informed opinion.

And also object to the receipt of judgments as between other persons and agreements as between other persons, they couldn't possibly have any bearing, being matters between another party, couldn't possible be admissions or proof here, and do not relate to an earlier time.

Also wish to object to the portion of the deposition, page 28 and following, with references to the claimed imitation of perfumes and using of

imitative names by the plaintiff, that being obviously a conclusion of the witness, and also being without foundation.

That is our objection, your Honor.

Mr. McKnight. No further comment.

The Court. I will allow the testimony to go in subject to motion to strike and over your objection.

* * * * *

Mr. Hutchinson. I would like to have it noted in the record and called to your Honor's attention that at a proper time we will, of course, object to any claim of reproductions or other things that wouldn't relate to VOODOO, and the evidence is clear it is always being claimed as an original. The deposition is now being offered?

Mr. McKnight. I will offer what I have read for the purpose of the admissions.

Mr. Hutchinson. Very well, I would like to make some reservations under the same understanding I had before, to be ruled on when the case is submitted.

First, I would like to object to portions of the deposition, and I needn't detail them now, that relates to all names other than VOODOO, for the reason stated; and particularly with reference to TABU, FORBIDDEN, and its variants, as referred to there.

* * * * *

Third, reference to all other brand names, those related to other owners, asserted or referred to in the testimony, as well as to those of the cross-complainant and defendant; and, fourth, any reference to the Merle Norman affair. That is entirely a matter before and between other

parties, couldn't possibly refer to VODOODO, and there is nothing in the deposition that suggests any other. And that ruling be reserved until later.

The Court. Very well."

The mass and repetitive effect of such inadmissible material could scarcely be resisted and its admission was prejudicially erroneous and prevented a fair trial to appellant.

3. APPELLANT'S MOTION FOR A NEW TRIAL.

By appropriate and timely motion (TR 47-51) and notice, appellant duly moved the Court for a new trial for the correction of erroneous ruling upon the substantive issues and errors in the admission of evidence.

To the extent the grounds of the motion are to be herein particularly urged, the motion reads:

I.

The evidence is insufficient to justify the judgment, including, but not limited to, findings respectively numbered 3, 4, 5 and 6;

II.

The judgment is contrary to the evidence, including, but not limited to, the findings thereof respectively numbered 3, 4, 5 and 6;

III.

The judgment is contrary to law and equity, and more particularly in that it would declare valid and protectible by injunctive processes of

the Court a trade name and mark resting entirely upon registration with appropriate agencies of the United States of America, but not with those of the States of California, Washington, Oregon, Nevada, the territories of Alaska and Hawaii or the District of Columbia—(1) without any evidence whatever of actual use of the trade name and mark in said places above named or elsewhere; (2) without any pretended use of the trade name and mark for more than four years after registration; (3) when a pretended use for less than two years was voluntarily abandoned without lawful excuse or explanation and remained so abandoned for more than three and one-half years and six years prior to the commencement of the instant action, and (4) in the face of cross-complainant's lawful appropriation and extensive, open, notorious and continuous use of the trade name and mark, as shown by undisputed and unquestioned documentary evidence, for more than five years prior to the commencement of the action following the appropriation and prior use theretofore of the trade name and mark by plaintiff's predecessor in interest for more than three years, as shown by such documentary evidence, such use having been made, generally and throughout the states, territories and other places above named;

IV.

Irregularities in the proceedings of the Court and on the part of plaintiffs by which cross-complainant was prevented from having a fair trial, including, but not limited to: (1) the presentation and receipt of evidence respecting asserted con-

duct by the predecessor in interest of cross-complainant, relating to (a) other and unrelated trade names and marks asserted by plaintiffs and (b) asserted trade names and marks not owned or claimed by any party, or any predecessor in interest of any party, to the action; (2) the overruling of cross-complainant's timely and valid objections to the offering and receipt of such evidence; and (3) the denial of cross-complainant's timely and appropriate motion to deny said evidence;

* * * * *

VI.

The conclusions of law in paragraph 9 through 12 set forth in said decree are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VII.

The provisions of paragraph 13 through 14 are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;" (TR 47-50.)

PART THREE: ARGUMENT.

SUMMARY OF ARGUMENT.

Appellant respectfully submits that the judgment below is unsupported in fact and contrary to law and applicable principles of equity; that the rulings upon evidence were prejudicially erroneous; and that the denial of its motion for a new trial was an abuse of judicial discretion. The first of these submissions are

of a substantive nature and the latter are of the procedural category, though depriving appellant of substantive rights.

Conforming to the outline in the statement of the case (Part Two, II, A, hereof) the questions presented for decision, we first consider the question of ownership of the trade-mark VOODOO.

Factually, the record demonstrates that appellant's predecessor was the first appropriator of the name VOODOO as a trade-mark for cosmetics of a distinctive scent and that appellant and its predecessor had carried on a continuous use of that trade-mark for at least 17 years prior to the instant judgment. The record is equally demonstrative—by every species of proof possible in the circumstances—that this appropriation was accomplished and such use in merchandising cosmetics commenced in the year 1934.

It is the rule of the common law, California statutory law and statutory law in registration of trade-marks, California and Federal, that appropriation and use of a trade-mark is the exclusive means of acquiring ownership. The corollary rule is that registration of a trade-mark neither creates nor confirms ownership of the trade-mark registered. Registration is exclusively designed to provide a procedural means of evidencing an intention to appropriate and to give notice to subsequent appropriators of the fact and time of appropriation of the registered material by the registrant.

Factually, appellees have not claimed appropriation by their predecessors prior to September 10, 1938, as

declared in the application for registration, and are precluded from now asserting any earlier appropriation. Further, appellees do not now assert any claim of appropriation prior to September 10, 1938, more than four years after appropriation and use by appellant's predecessor in interest. It is factually impossible, therefore, to declare appellees' predecessor the first appropriator of the trade-mark VOODOO and, in consequence, it is factually and legally impossible to declare appellees the owners of the trade-mark VOODOO.

Still further, the mere declaration of an intention to appropriate, by application or other means, does not constitute appropriation. Hence, appellees' failure to make any pretended use of VOODOO in merchandising until May 30, 1944, more than five years after registration and more than five and one-half years after declaration of intention to appropriate, prevents assertion of appropriation prior to May 30, 1944.

Finally, the pretended use of VOODOO in the years 1944-1948 was patently to create evidence. The miniscule quantities, dispersion of mailings of the identical date, the retention of such specific records of negligible transactions demonstrates this pretended "use" as making evidence—not bona fide merchandising.

Thus, appellees' first use of the mark was in 1949—ten years after declaration of the intention to appropriate the name VOODOO as a trade-mark.

There are subsidiary deficiencies⁵ in the showing necessary to support the judgment which need not be here noted for the reason that there is a complete and incurable defect in proof of first appropriation and continuous use essential to any finding or conclusion of ownership in appellees.

The candid statement of the Court at the hearing upon the motion for a new trial (TR 282-283, quoted in Part One hereof) discloses that this case was not decided upon any determination of the first appropriator as between these parties.

Appellant must prevail upon this record upon each of the substantive questions presented.

The answers to questions of procedural propriety are equally patent.

The pleadings and the opening statements irrevocably removed from the case every possible issue respecting every trade-mark except VOODOO. It was error, therefore, to admit any evidence respecting TABU and FORBIDDEN over timely objection. Ap-

⁵Appellees may not claim benefits under the 1905 Trade Mark Act (or Amendatory Acts of 1920, 1928, etc.) or the asserted "republication" upon this record under the 1946 Act. The asserted registration under the 1905 Act would have expired on January 3, 1949 (ten years).

Under the 1946 Act republication was required under all contingencies here indicated not later than January 3, 1949, whereas the "republication" claimed was not issued until August 9, 1949.

See:

15 USCA 1062;

Rules 100.301, 100.351 and 100.352;

37 C.F.R. (Appendix 15 USCA, following Section 1127).

Apparently, all claims under the asserted 1939 certificate have lapsed and expired.

pellees' insistence in doing so must be taken as intended to prejudice the trial and decision.

Appellees' further insistence upon intruding references to the trade-marks of third persons must have been activated by the same animus and, as demonstrated, prejudiced the trial and decision.

The prejudice was implemented by the further consideration that any conduct respecting any trademark of any person, other than VOODOO, and assuming it would be admissible against any one at any time, was (1) the conduct of appellant's predecessor at least three years before its creation and (2) had occurred beyond the period of limitations.

We have discovered neither authority nor principle to support the admission of such material in trademark or general litigation in these circumstances.

Even the equitable doctrine of "clean hands", if factually applicable, can never become an affirmative means to recovery; it is a shield—not a weapon of aggression; and can only bar affirmative recovery of equitable relief otherwise available.

The authority to grant a new trial to permit correction of errors by the Court wherein they have occurred was timely invoked and should have been exercised.

I.

**THE SUBSTANTIVE LAW OF TRADE-MARKS
HERE APPLICABLE.**

For convenience, we briefly note the common law, statutes and rule of decision applicable to the issues herein.

A. Ownership and property in trade-marks are acquired exclusively by appropriation.

The principal substantive provisions of law relating to trade-marks and trade names are set forth in the Business and Professions Code of the State of California. These statutes are declaratory of the common law.

See:

- Weatherford v. Eytchison*, 90 C.A. (2d) 379, 383 [202 P. 1040];
Derringer v. Plate, 29 Cal. 292, 298 [74 P. 359].

The provisions of the cited code deemed particularly pertinent to the facts of this case include the following:

1. Trade-marks.

14200. "Except as otherwise provided in this chapter, a trade-mark may consist of any form, symbol, or name."

14202. "*Any person who produces or deals in a particular thing, may appropriate a trade-mark to his exclusive use, to designate the origin of the thing.*"

14203. “*No person may appropriate a trade-mark which has been appropriated by another person.*”

14270. “*Any person who has first adopted and used a trade-mark, whether within or beyond the limits of this State, is its original owner.*”

14272. “*Any trade-mark may be transferred in the same manner as personal property in connection with the good will of the business in which it is used or the part to which it is appurtenant, and the owner is entitled to the same protection by suits at law or in equity.*”

2. Trade names.

14400. “*Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner.*”

14401. “*Any trade name may be transferred in the same manner as personal property in connection with the good will of the business in which it is used or the part thereof to which it is appurtenant, and the owner is entitled to the same protection by suits at law or in equity.*”

The *Civil Code of California* further provides in Section 655 that:

“There may be ownership of * * * the good will of a business, trade-marks and signs, and of rights created by statute.”

These statutes have been in effect for at least 75 years. The cited codes of California further create in the owners of trade names, trade-marks and good will, rights to damages, accounting and injunction for infringement, misappropriation and interference.

See, *inter alia*:

Business and Professions Code, Section 14300;
Civil Code, Section 3369.

The codes of California further provided for the registration or recording of the fact of appropriation and use of trade names and trade-marks (Sections 14229 et seq., *Business and Professions Code*) but—

“In order for plaintiff to appropriate this word as a trade-mark it was not necessary for the same to be registered with the Secretary of State. (Bus. & Prof. Code §§ 14202, 14270; *Ward-Chandler Bldg. Co. v. Caldwell*, 8 Cal. App. 2d 375 [47 P. 2d 758]; 24 Cal. Jur. 623, § 10.)”

(*Cole of California v. Grayson Shops*, 72 C.A. (2d) 772, 777 [165 P. (2d) 963].)

Upon appropriation or use, or both, of trade names and trade-marks in California, the same become “domiciled” in California.

Rainier Brewing Co. v. McColgan, 94 C.A. (2d) 118, 121 [210 P. (2d) 233].

It is the unchallenged rule that state substantive law controls in litigation involving trade names and trade-marks, even when pending in the Federal Court.

Nims, Unfair Competition and Trade Marks,
pages 626, et seq. and pages 511, et seq.;

52 *Am. Jur.* 572, Trade Marks, Par. 90;

3 *A.L.R.* 1226, 1236;

15 *U.S.C.A.* 1114, Par. 5 of annotation,

and cases cited, particularly:

Pecheur Lazenge Co. v. National Candy Co.,
315 U.S. 666, 86 L. Ed. 1103.

See, also:

The Trade-Mark Cases, 100 U.S. 82, 25 L. Ed. 550.

B. Registration does not create or confirm ownership in a trade-mark.

Registration, even innocent registration in good faith, does not create or confirm any right not already acquired by a first and prior appropriation and use.

The rule is succinctly stated in

52 *Am. Jur.* 534-535, Par. 44, Trademarks, Tradenames,

as follows:

“It has frequently been declared that the registration of a trade-mark does not create or confer any additional substantive rights therein; the effect of registration statutes, ordinarily, *is merely to recognize rights which have already been acquired by appropriations*, and to provide additional remedies for the protection thereof. There are some cases which seem to lend support to the view that registration under the Federal statute narrows, rather than enlarges, the substantive scope of protection of a trade-mark, by limiting such protection to use of the trade-mark on competitive goods. * * *

“The admission of a trade-mark to registration is not conclusive as to the validity thereof, *and does not prevent collateral attack thereon*. Under a statute providing for registration, it has been decided that a disputed *trade-mark cannot be appropriated by filing a written claim thereto, al-*

though the original claimant had never filed such a document for registration."

In support of this statement, the authors of this work cite, *inter alia*, the case of

American Trading Co. v. H. E. Heacock Co.,
285 U.S. 247, 76 L. ed. 740,

for which they say:

"The Federal Trademark Act of 1905 does not attempt to create exclusive substantive right in marks, or to afford a refuge for piracy through registration under the act, * * *".

See, also:

United Drug Co. v. Theodore Rectanus Co.,
248 U.S. 90, 63 L.ed. 141.

Mr. Nims, in his leading work

Unfair Competition and Trade Marks, *supra*, further outlines these principles as follows (Section 214, pages 626, 627 and Section 217, page 632):

"A trade-mark is not acquired by registration, or by securing a certificate of copyright for the label on which it appears. Three things must be done to acquire a good title to a trade-mark. First, a name or device must be selected that may be appropriated as a trade-mark; second, it must be applied physically to a vendable commodity or to some label, tag or wrapping used on such commodity, and third, the commodity so marked must be sold on the market. In this way only can a name or device become a trade mark. And one further condition remains: such right to the ex-

clusive use of this name or device must be founded on priority of use.

* * * * *

It is not necessary that it be used in interstate commerce. Such use is, however, essential to Federal Registration." (p. 262.)

* * * * *

"The Supreme Court has said *the exclusive right to the use of the mark or device claimed as a trade-mark is founded upon priority of appropriation; that is to say, the claimant of the trade-mark must be the first to use or employ the same on like articles of production.*

* * * * *

The invention or selection of the mark, or the decision to adopt it is not sufficient to establish trade-mark rights." (p. 627.)

* * * * *

"No particular extent of use is necessary in the case of a fanciful trade-mark. For this purpose one bona fide sale of goods bearing the mark is effective, but it must be bona fide. Thereafter, others must avoid the mark and between rival claimants 'it is the priority of user alone that controls, even though when the defendant comes into the field, it may not be fully established or may not be enough established to have become associated largely in the public mind as the plaintiffs make'." (p. 632.)

See, also, the innumerable cases cited in the annotations to Title 15, U.S.C.A., Section 1052 (Registration), particularly in paragraphs 321 and 325 thereof; and to Section 1051 (Application for Registration), particularly in paragraphs 53, 65, 68 and 69.

We have been unable to discover any authority to the contrary.

It is our submission, therefore, that the Court must accept the rule of decision of these many and uniform holdings of the Federal and State Courts throughout the history of registration legislation as summarized by the authorities above cited, *as the law and the rule of decision to be applied in this case*, namely:

Ownership of a trade name and mark depends upon first appropriation and use, regardless of any registration, State or Federal, and regardless of the first to register, and, further, regardless of registration by one party and non-registration by the other.

II.

EVIDENCE RELATING TO TRADE-MARKS NOT IN ISSUE WAS INADMISSIBLE.

As noted in the statement of the case, a vast amount of evidence was admitted concerning the trade-marks TABU and FORBIDDEN asserted by appellees. As the pleadings, opening statements, admissions and testimony uniformly eliminated all question and issue with respect to these trade-marks, it would appear that no authority is required for the proposition that it was error to receive evidence over timely objection respecting these trade-marks.

It was error, also, to admit evidence respecting the trade-marks and products of third persons in which neither the appellees nor appellant claimed any right.

Res inter alios acta has been recognized as a sound objection since the earliest times.

There appears to be no basis for making a distinction in trade-mark litigation. We have discovered no authority and none was cited by appellees below, holding that a plaintiff may introduce such evidence to establish plaintiff's case in chief.

It may be noted that—even where a moving party seeking affirmative relief may be precluded from recovery by a proper showing that he has acted unfairly—it is the rule that any such showing must be related specifically and directly to the subject matter with respect to which the affirmative relief is sought.

In trade-mark litigation, such defense where available is similarly restricted to a showing upon the specific subject matter of the litigation. Mr. Nims, in his work,

Unfair Competition and Trade Marks, supra
(para. 388, page 1222),

states that evidence may not be introduced to show that a plaintiff has acted unfairly toward third persons with regard to subject matter not connected with the suit at bar and that the defense of unfair dealing must relate to the subject matter of the pending action, citing—

Sperry and Hutchinson v. L. Weber & Co., 161
Fed. 219.

The introduction of this evidence as against appellant was erroneous, in any and all events, for the further reason that appellant had not at any time

engaged in any asserted wrongful conduct with respect to any one, appellees or third persons, and the asserted misconduct claimed by appellees in support of their proffer of evidence of this category concededly related to periods prior to 1943, appellant having come into being in 1946. In trade-mark litigation, it is the accepted rule that asserted misconduct, when available for any purpose, must relate to the parties in suit and that asserted misconduct of predecessors in interest cannot be introduced to the prejudice of an innocent successor.

Mr. Justice Learned Hand, in the case of

Lambert Pharmacal Co. v. Bolton Chemical Corp., 219 Fed. 325,

stated the rule as follows:

“It is pharisaical to visit the sins of one generation upon the next in the aid of those who now seek to trade upon the efforts of the present.”

and Mr. Justice Sanborn, in the case of

Layton Pure Food Co. v. Church, 182 Fed. 24, further stated the principle here applicable as follows:

“* * * the complainant was never guilty of any infringement of any rights of any one, and the sins of the predecessors may not be charged to its account.”

See, also Nims, in his work,

Unfair Competition and Trade Marks, supra (para. 217a, page 631, and para. 393, page 1232).

Finally, evidence of misconduct which is beyond the statute of limitations, or would be barred by laches, may not be admitted, even against the asserted wrongdoer.

See

County Chemical Company v. Frankenberg, 21
RPC 722,

and

Nims, *Unfair Competition and Trade Marks*,
supra (para. 414, page 1298).

There was no evidence proffered or received of any wrongdoing on the part of appellant's predecessor at any time subsequent to the year 1943, seven years prior to the institution of the suit at bar.

The nature of the evidence of these categories and the reaction of the Court make it apparent that introduction of such evidence was prejudicially erroneous and prevented a fair trial.

PART FOUR: CONCLUSION.

It is respectfully submitted that the judgment is erroneous and the findings unsupported on the substantive question of first appropriation and use by appellees' predecessors and, therefore, of ownership of the trade-mark VOODOO in appellees; that the finding of appellees' ownership of the trade-mark VOODOO is contrary to all the evidence in the case because their predecessors were not the first appropriators and undertook no bona fide merchandising

under the trade-mark prior to the year 1949; it is further respectfully submitted that the trial and decision was irrevocably prejudiced by the erroneous admission and consideration of evidence without the issues and scandalous in nature, resulting in a mistrial; and that, for each of these reasons, the judgment should be reversed.

Dated, San Francisco, California,

November 17, 1952.

Respectfully submitted,

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No. 13389

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

ROLLEY, INC.,

Defendant-Appellant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD YOUNG-
HUSBAND, Co-partners, Doing Business As CONSOLI-
DATED COSMETICS and LES PARFUMS DE DANA,
INC.,

Plaintiffs-Appellees.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES.

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No. 13389

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT.

ROLLEY, INC.,

Defendant-Appellant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD YOUNG-
HUSBAND, Co-partners, Doing Business As CONSOLI-
DATED COSMETICS and LES PARFUMS DE DANA,
INC.,

Plaintiffs-Appellees.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES.

JURISDICTION.

The complaint herein sets forth that "This is an action under the trade mark laws of the United States" (R. 3).^{*} Defendant-appellant^{*} admits this fact in its answer (R. 11)^{*}

Plaintiffs-appellees'^{*} trade mark VOODOO was granted registration No. 363,746 on January 3, 1939, for perfume and cosmetics by the United States Patent Office (R. 4,

^{*} R. indicates the printed record, and the number following the page thereof. PX indicates Plaintiffs-Appellees' Exhibit and the number following, that of the exhibit.

In this brief Plaintiffs-Appellees and Defendant-Appellant will be referred to as Plaintiffs and Defendant respectively.

80). This registration, issued under the Act of 1905, was affirmed under the Act of 1946, so that plaintiffs are entitled to the remedies and benefits of the Act of 1946 (R. 80).

Sections 32, 34, 35 and 39 of the Trade Mark Act of 1946 are pertinent, establishing that the District Court had original jurisdiction and this Court has appellant jurisdiction in this case.

The complaint also alleges that this action is “between citizens of different states, in which the amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00” (R. 3, 4). Plaintiffs are of Chicago, Illinois, and New York, New York, and defendant is a California corporation (R. 3). This is admitted in defendant’s answer (R. 11). Jurisdiction is also established therefor as set forth in the following case:

In *Stork Restaurant, Inc., v. Sabatine*, 76 USPQ 374, this Court restrained defendant from using Stork Club on a restaurant in San Francisco in view of plaintiffs’ prior use of STORK CLUB in New York. The Court said:

“Ownership of a trade name is a property right. It is made so by statute in California. Sections 14,400; 14,401 and 14,402 of The Business and Professions Code (Deering 1944).”

STATEMENT OF THE CASE.

This is a suit for trade mark infringement and unfair competition (R. 3-9). Plaintiffs are famous in the perfume industry and their TABU, TABOO, FORBIDDEN and VOODOO perfumes and toilet waters are sold in every important department and drug store in San Francisco, Los Angeles and other California cities and in every state of the Union (R. 89, 90). Because of the extensive advertising of plaintiffs' products and the excellence of their quality, the sales of plaintiffs' products have exceeded 32 million dollars (R. 90). The purchasing public has come to recognize products bearing the trade marks TABU, TABOO, FORBIDDEN and VOODOO only as plaintiffs' products, and has made these trade marks valuable property rights (R. 90).

Plaintiffs' said trade marks are registered in the United States Patent Office and in the Office of the Secretary of State of the State of California (R. 75-88, 102).

Defendant Rolley, Inc., is dominated by its president, founder and predecessor, Charles A. Rolley (R. 112, 156). Mr. Rolley was originally in the shoe dye business (R. 157). In his spare time he began copying wellknown perfumes (R. 125, 164, 188, 189, 194-197), and did so well at it that he dropped the shoe dye business and formed the defendant corporation (R. 187). TABU was among the perfumes which Mr. Rolley copied (R. 193). He also used the trade mark FORBIDDEN FLAME (R. 117), which plaintiffs urge is an infringement of plaintiffs' FORBIDDEN, TABU and TABOO. Later Mr. Rolley came out with his infringing VOODOO perfume and toilet water (R. 132).

The District Court found that defendant “has, at dates later than the first use of the trade mark VOODOO by plaintiffs and without plaintiffs’ consent, used the trade mark VOODOO on and in connection with the sale of perfume and toilet water” (R. 43), and enjoined defendant from further use of said trade mark (R. 45). Since defendant had abandoned the trade mark FORBIDDEN FLAME, the District Court held that no further order was considered necessary with respect to the trade marks TABU, TABOO and FORBIDDEN (R. 44).

Defendant filed a cross complaint for infringement on the trade mark VOODOO (R. 16-21), but in view of plaintiffs’ prior use and registration of VOODOO, the counterclaim was dismissed (R. 46).

In its cross complaint defendant had filed suit against not only plaintiff but also 21 prominent stores who were plaintiffs’ customers for alleged infringement of the trade mark VOODOO (R. 16-21). Plaintiffs’ motion for temporary injunction to restrain defendant from proceeding with this suit against 21 stores and from filing further suits against any of plaintiffs’ customers was granted by Judge Erskine after full briefs and hearings (R. 21-33). This injunction was made permanent by Judge Roche after the trial herein (R. 46).

The three principal questions before this Court are whether this Court should not affirm the District Court in

1. Restraining defendant from infringing plaintiffs’ registered trade marks VOODOO, TABU and FORBIDDEN,
2. Dismissing defendant’s counterclaim alleging infringement of the trade mark VOODOO, and
3. Restraining defendant from suing plaintiffs’ customers for alleged infringement of the trade mark VOODOO.

ARGUMENT.

Title to the Trade Marks Set Forth in the Complaint Is Established as in the Plaintiffs by the Record and Exhibits.

The trade mark registration of VOODOO No. 363,746 is in evidence as plaintiffs' Exhibit 8 (R. 80). It was issued by the United States Patent Office to Associated Distributors, Inc., one of plaintiffs' predecessors, on January 3, 1939 (R. 80).

Certified copies are offered in evidence for the registrations TABU No. 314,493 (PX 2); TABU No. 407,797 (PX 3); TABU No. 426,323 (PX 4); TABOO No. 343,897 (PX 5); TABOO No. 437,162 (PX 6); FORBIDDEN No. 408,529 (PX 7); and VOODOO No. 363,746 (PX 8). Copies of these registrations were identified by the witness Gaumer as obtained from the official files of the United States Patent Office (R. 88).

Plaintiffs' titles to the various registrations are in good order and established by Mr. Gaumer's painstaking testimony (R. 72-88), and by certified copies of registrations and assignments all showing the passing of the good will connected with the business with which said trade marks were used. (Plaintiffs' Exhibits 1-17.)

Defendant's counsel at the outset of the trial conceded plaintiffs' title when he said "with relation to VOODOO and registration for VOODOO, we do not challenge they have the certificate here and do not raise any objection to the foundation" (R. 80).

Plaintiffs also own registrations of TABU, FORBIDDEN and VOODOO issued by the Secretary of State of

California. The originals of the registrations are offered in evidence as plaintiffs' Exhibits 98, 99 and 100 (R. 102, 107).

The District Court found that title to the trade marks and registrations was in plaintiffs (R. 43-44).

**Plaintiffs Are Entitled to the Benefits
of the Act of 1946.**

All of plaintiffs' registrations have been duly republished under the Act of 1946 (R. 74-81, PX 2-8). Under Sec. 12(c) of said Act of 1946, plaintiffs became entitled to "the benefits of this Act for said marks".

Defendant asks, "What benefits are plaintiffs entitled to under the Act of 1946?" This is answered on page 280 of 15 USCA as follows:

"Whereas a 1905 registration was prima facie evidence of ownership, a principal registration (under the Act of 1946) is prima facie evidence of ownership, validity of the registration, and of the registrant's exclusive right to use the mark in commerce."

"The greatest single advantage of a principal registration is that it is constructive notice of the registrant's claim of ownership. This means simply that as long as the mark remains on the principal register, anyone is charged with notice of claim of ownership, and no rights may be claimed in the mark of another who commenced to use it after the registration issued * * * such use cannot be justified by a claim of innocence, good faith or lack of knowledge. Its practical effect is to give nationwide effect to a principal registration."

Section 7(b) of the Act of 1946 provides:

"A certificate of registration of a mark upon the principal register provided by this Act shall be prima facie evidence of the validity of the registration,

registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate."

Defendant is violating plaintiffs' exclusive right to use its registered marks under the Act of 1946, and plaintiffs are entitled to relief against such infringement.

Plaintiffs' Products Bearing Its Trade Marks Have Been For Many Years And Are Now Advertised And Sold In All Principal Stores From Coast To Coast.

In San Francisco plaintiffs' perfumes and cosmetics are sold in the City of Paris, The Emporium, I. Magnin, Roos Bros., Raphael-Weill, Macy's, Hale Bros., H. Liebes & Company, J. Magnin, The White House and Owl Drug Company, and many other stores (R. 89).

In Oakland plaintiffs' TABU and VOODOO lines are sold in H. C. Capwell, Sullivan & Furth, I. Magnin, J. Magnin, Kuhn's, and many other stores (R. 89-90). In Los Angeles the following stores carry plaintiffs' products: Robinson's, Bullock's, Magnin's, The Broadway, The May Company, Owl Drug, Whelan Stores, Eastern Columbia, Haggerty's, and Saks Fifth Avenue (R. 90). Plaintiffs' perfumes, colognes and other cosmetics bearing their famous trade marks are sold in all of the principal stores in California, Oregon, Washington and "from coast to coast in every city in the United States" (R. 90).

The sales of plaintiffs' TABU, TABOO, FORBIDDEN and VOODOO perfumes and colognes have been extensive. They have exceeded thirty-two million dollars throughout the United States (R. 90). VOODOO sales have already passed a quarter of a million dollars (R. 90).

Plaintiffs' famous TABU, TABOO, FORBIDDEN and

VOODOO products are offered in evidence as plaintiffs' Exhibits 18 to 23 (R. 91, 108).

Plaintiffs' national distribution of its trade marked products is backed by millions of dollars in national advertising in high grade magazines of national distribution such as Harper's Bazaar, Town and Country, Vogue, and locally in all the important daily newspapers (R. 91). Typical TABU advertisements are offered in evidence as plaintiffs' Exhibits 24 to 41 inclusive to show plaintiffs' tremendous advertising (R. 92). These advertisements begin with September of 1941 to date (R. 93). Plaintiffs' trade mark FORBIDDEN is also featured in all of these advertisements (R. 93). Typical VOODOO advertisements are offered in evidence as plaintiffs' Exhibits 42 to 84 inclusive (R. 94). Of these VOODOO advertisements, PX 42-44 appeared in such nationally distributed magazines as Harper's Bazaar, Vogue, Beauty Fashion and The New Yorker (R. 94).

Mr. Gaumer testified "There have been hundreds of advertisements of plaintiffs' perfumes and colognes in metropolitan newspapers in San Francisco, Oakland, Los Angeles, and other cities. For instance, plaintiffs' Exhibit 49 is for VOODOO perfume by the City of Paris, appearing in the San Francisco Examiner for December 21, 1950; plaintiffs' Exhibit 50 is a VOODOO advertisement appearing in Haggerty's store advertisement in the Los Angeles Times for December 11, 1950. Plaintiffs' Exhibits 51 and 52 are large advertisements of plaintiffs' VOODOO perfume by Robinson's, one of the largest stores in Los Angeles. These ads appeared in the Los Angeles Times. Plaintiffs' Exhibit 54 is an advertisement of VOODOO and TABU perfume, appearing in Seattle, Washington. Plaintiffs' Exhibits 56 and 57 are VOODOO ads in the Portland, Oregon, newspaper.

Other advertisements are shown in this group of exhibits throughout the United States including the West Coast" (R. 96-97).

Such advertising of plaintiffs' products has exceeded \$2,380,000 (R. 96). The plaintiffs are all related companies and cooperate together in the production and sale of the trade marked products involved in this case (R. 97).

The advertising and sale of plaintiffs' TABU, TABOO, FORBIDDEN and VOODOO perfumes and colognes and cosmetics has been so extensive that there are very few women in the metropolitan districts of the United States who have not heard of plaintiffs' said products (R. 102). These trade marks have become so well and favorably known that they are associated with plaintiffs and their products, and said trade marks are understood to mean to the trade and the purchasing public that products sold under or by said trade marks are the products of plaintiffs (R. 102, 103).

Because of the extensive sale, the widespread advertising and the high quality of plaintiffs' trade marked products, plaintiffs own a valuable asset in the good will associated therewith.

Plaintiffs' Registration and Ownership of the Trade Marks Tabu, Taboo and Forbidden Are Not Contested by Defendant.

In paragraph 6 of the complaint, plaintiffs plead:

"Plaintiff is now and has been for some time last past the owner of said trade marks TABU, TABOO, FORBIDDEN and VOODOO and registrations Nos. 314,493; 407,797; 426,323; 343,897; 437,162; 408,529 and 363,746 therefor, issued by the United States

Patent Office, and registrations Nos. 27,543; 30,388 and 32,733 issued by the Secretary of State of California, together with the good will of the business and that of its predecessors, and said registrations are valid, subsisting, uncanceled and unrevoked.” (R. 4.)

In its answer, defendant makes no response to paragraph 6 as to TABU, TABOO and FORBIDDEN (R. 11-16). Since there are no denials, the facts pleaded in paragraph 6 of the complaint as to TABU, TABOO, and FORBIDDEN are admitted by the defendant.

Forbidden Flame Is An Infringement Of Forbidden, Tabu and Taboo.

Charles A. Rolley, president of the defendant, testified on discovery deposition that there had been sales of FORBIDDEN FLAME perfume and cologne (R. 115, 116). Rolley included FORBIDDEN FLAME perfume in a list which he admits (R. 196). Rolley also admits selling FORBIDDEN FLAME perfume (R. 197). This list (PX 1) is brazenly headed ROLLEY REPRODUCTIONS. Naturally, with TABU perfume known throughout the nation as THE FORBIDDEN PERFUME, Rolley's FORBIDDEN FLAME was obviously intended as a copy or reproduction of plaintiffs' TABU (R. 101). Rolley's glib but lame excuse that FORBIDDEN FLAME was a copy of TOUJOURS MOI (R. 197), is rebutted by Rolley's admission that he knew of TABU before coming out with FORBIDDEN FLAME (R. 116-117), had seen advertising of TABU as THE FORBIDDEN PERFUME (R. 118), and that both TABU and FORBIDDEN FLAME had a distinct oriental fragrance (R. 121). On cross examination Mr. Rolley was asked, "Did you ever copy TABU?" and he answered, "I have copied TABU" (R. 193). It is apparent that Rolley's use of

FORBIDDEN FLAME was a deliberate attempt to reproduce plaintiffs' trade mark as well as plaintiffs' fragrance and to benefit thereby.

Plaintiffs' Exhibit 21 for plaintiffs' FORBIDDEN perfume disposes of defendant's claim of non use, as does plaintiffs' registration of FORBIDDEN in the United States Patent Office, in evidence as plaintiffs' Exhibit 7 (R. 79). Plaintiffs' Exhibits 24 to 41 all show use of FORBIDDEN in connection with TABU, which is known as THE FORBIDDEN PERFUME (R. 93). TABU and FORBIDDEN are synonymous (R. 93). They both mean the same thing. Naturally, the Patent Office will grant registrations for synonymous trade marks to the same owner or a related company. For instance, the Coca Cola Company owns trade mark registrations for both COCA COLA and COKE. They are synonymous. What could possibly be fraudulent about that?

FORBIDDEN FLAME is submitted as an infringement of FORBIDDEN and also of TABU.

Plaintiffs' Exhibit 1 shows defendant's use of FORBIDDEN FLAME. Mrs. Anis, one of defendant's witnesses, knew about FORBIDDEN FLAME perfume, that its number was 15 and "If there was a call for it, we had it in bulk" (R. 263).

Defendant's use of FORBIDDEN FLAME was certainly subsequent to plaintiffs' registration of TABU 314,493, issued July 3, 1934. Rolley claims 1939 for FORBIDDEN FLAME (R. 115).

Any further or future use of FORBIDDEN FLAME by defendant should be restrained. If defendant has discontinued use of FORBIDDEN FLAME, such restraint will cause it no distress of any kind.

Mr. Rolley, who dominates the corporation defendant, Rolley, Inc., admitted that he copied plaintiffs' TABU perfume. He testified outright in his own words—"I have copied TABU" (R. 174). It is inescapable that FORBIDDEN FLAME must have been used on the fake TABU that Mr. Rolley created.

The District Court found that defendant had abandoned FORBIDDEN FLAME and discontinued its use and that there was no need for any further order (R. 44). Plaintiffs submit that any further copying of TABU and use of FORBIDDEN FLAME should be enjoined.

Plaintiffs' Registration of Voodoo Is Prior to the Earliest Claim of Use of Voodoo Which Defendant Makes in Its Pleadings.

Plaintiffs' registration of the trade mark VOODOO for cosmetics No. 363,746 was issued by the United States Post Office on January 3, 1939, on an application filed on September 10, 1938 (PX 8, R. 80).

Defendant pleads in paragraph 1 of its cross complaint: "Commencing on or about the 15th day of April 1940, (defendant) created, used and employed the name VOODOO" (R. 16). The District Court did not permit defendant to amend this date (R. 71-72).

Defendant pleads in paragraph 3 of its counterclaim: "That beginning on or about the 15th day of April 1940, the defendant as cross-complainant and its predecessor have been the owners of the trade mark VOODOO" (R. '17).

In paragraph 6 of its counterclaims defendant pleads: "That ever since the 15th day of April 1940, hereinbefore stated, defendant and cross-complainant and its predecessor have been and still are the sole proprietors and

owners of the trade name VOODOO and all right, title and interest in and to the same” (R. 19).

Since April 15, 1940, is subsequent to plaintiffs’ registration date of January 3, 1939, and plaintiffs’ application date of September 10, 1938, there can be no doubt that plaintiffs have prior rights to the trade mark VOODOO and that defendant’s use constitutes an infringement.

A study of defendant’s proofs, hereinafter set forth, will disclose that defendant made no actual use of VOODOO on perfume earlier than 1943.

Plaintiffs’ Registrations Are Prima Facie Evidence of Plaintiffs’ Ownership of the Trade Marks Covered by the Registrations.

A registered trade mark has always been regarded prima facie as a valid mark before the Courts.

Section 33 of the Act of 1946 codifies the Common Law on this point as follows:

“Sec. 33. (a) Any certificate of registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or of a mark registered on the principal register provided by this Act and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of registrant’s exclusive right to use the registered mark in commerce on the goods or services specified in the certificate * * *”

This Court stated in *Dollcraft Co. v. Nancy Ann*, 94 Fed. Sup. 1:

“The registration of a name raises a presumption of its legality.”

The D.C.S.D. California in *Western Stove Co. v. Geo. D. Roper*, 82 Fed. Sup. 206, stated that the:

“registration No. 437,191 is prima facie evidence of ownership (U.S. Code Title 115, Sec. 96).”

In *Weiner v. National Co.*, 123 Fed. 2nd, 96, the CCA7, speaking of a trade mark registration said:

“A strong presumption exists as to the validity of the mark.”

In *Helena Rubenstein, Inc., v. Agazim*, 81 USPQ 59, the respondent claimed that there should be a dismissal because no testimony had been taken as to use. The Commissioner, in denying this contention, said:

“Opposer made its prior registration of record and the ownership thereof constitutes prima facie proof of ownership and use of the mark.”

Plaintiffs' registrations of TABU, TABOO, FORBIDDEN and VOODOO are therefore prima facie valid before this Court.

Plaintiffs also offered in evidence certified copies of assignments of these registrations from the predecessors of plaintiffs, the original registrants down to the plaintiffs (R. 82-88).

In *Rosengart v. Ostrex Co.*, 136 Fed. 2nd 249, before the U.S.C.C.P.A. the petitioner relied upon his trade mark registration and copies of assignments. The Court said that such proof was sufficient without the need of further testimony of use of the mark:

“One who owns a mark is presumed to be using it because a mark ceases to be owned when it is not used in connection with a business, and if the registration is prima facie evidence of ownership and use, it would seem to follow that an assignment of the same, made and recorded in accordance with the statute, gives further evidence of use or negatives abandonment of the mark. We think the Commissioner properly held: ‘There being no evidence to the contrary, its registration proves ownership, and ownership implies use.’”

As to the original registrations, defendant made no objection as to TABU, TABOO or FORBIDDEN and as to VOODOO defendant's counsel stated, "We have no objection to it being received as to ownership of the certificate outlined therein" (R. 109).

As to the assignments, defendant's counsel stated, "We do not challenge they have the certificate here and do not raise any objection to the foundation" (R. 80).

**Plaintiffs' Registrations Not Only Imply
Ownership But Also Use.**

A registration of a trade mark duly issued by the United States Patent Office implies that such mark has also been used and is being used.

The law is very clearly defined by the following cases on the subject.

In *Ely & Walker v. Sears, Roebuck & Co.*, 90 Fed. 2nd 257, the U.S.C.C.P.A. said:

"Registration of a trade mark is prima facie evidence of its ownership * * * Upon the question of use by opposer of its mark on a trade mark, which counsel for appellant insists is placed in issue by denial of such use in the answer, it need only be said first that ownership implies use."

In the above cited case plaintiff took no testimony and relied upon a copy of its trade mark registration which it offered in evidence. Defendant claimed that because plaintiff took no testimony that no use had been established by the plaintiff. The Court held that the registration was sufficient and said:

"The foregoing indicates that counsel for appellant (defendant) overlooked the effect of the statutory provision making a registration prima facie evidence of ownership."

This case is pertinent to the case at bar. Defendant did not attack plaintiffs' registrations. Defendant did not even attend plaintiffs' deposition in Chicago, nor cross examine plaintiffs' witness. Defendant has not shown that plaintiff did not use the trade marks VOO-DOO, TABU and FORBIDDEN. Defendant seems to assume that plaintiff must put in evidence testimony of witnesses as to use by plaintiff of its trade mark. This is entirely unnecessary because with plaintiffs' registrations in evidence, such registrations imply ownership, and ownership implies use. These presumptions have not been overcome or even attacked. Under the authorities plaintiffs are entitled to the statutory protection of their registrations—which imply ownership and use.

In *D. J. Bielzoff v. White Horse*, 107 Fed. 2nd 585, the U.S.C.C.P.A. held that petitioner need offer no further proof than its trade mark registration and said:

“There is no evidence of record relative to the use of appellee's (Petitioner's) trade mark BLACK HORSE in the United States, and although counsel for appellant argue that it is not used in this country, it is sufficient to say that appellee's registration is prima facie evidence of ownership and will be considered as prima facie valid in this proceeding.”

The foregoing case is pertinent, because appellant's counsel therein thought plaintiff should offer witnesses to show sales in the United States. The registration was sufficient. Such use was presumed. In the case at bar defendant's counsel seems to feel that plaintiff should take testimony to show sales in California. Such use in California is presumed by plaintiffs' Federal registrations.

In *Lehn & Fink v. Wyeth*, 77 USPQ 633, the Commissioner held:

“In the absence of contrary evidence, registration is prima facie evidence of registrant’s ownership and use of mark.”

Defendant offered no evidence to the contrary in the case at bar, so plaintiffs’ registrations are prima facie evidence of ownership and use.

Plaintiffs Are Entitled Under Their Registrations to the Filing Dates of the Applications Which Resulted in the Registrations As Their First Dates of Use.

Under the registrations, which provides plaintiffs with evidence of ownership and use, plaintiffs’ date of use goes back as early as its filing date of the applications which resulted in the registrations.

In *Wells, Lamont Corp. v. Blue Ridge Overalls Co.*, 77 USPQ 542, the Commissioner of Patents said:

“When a registration issues, the date on which its application was regularly filed is that which must be accepted as prima facie evidence of ownership.

“Registration is prima facie evidence of ownership and use not only as to the date of registration but of the date on which application was filed.”

In *Federal Products Co. v. Lewis*, 23 Fed. 2nd 759, the Court of Appeals for the District of Columbia stated:

“Inasmuch as the applicant took no testimony, its filing date is the earliest date that it can claim.”

As to VOODOO, plaintiffs are entitled to September 10, 1938, as the date of use of VOODOO, as this date is the date on which the application was filed in the United States Patent Office which later resulted in plaintiffs’ registration No. 363,746 of VOODOO in evidence in this case (PX 8, R. 80). This is earlier than the date of April 15, 1940, pleaded in defendant’s cross complaint (R. 16-20).

Defendant Has the Burden of Proving by the Preponderance of the Evidence That Its Use of Voodoo Was Prior to the Date of Plaintiffs' Application for Registration of Voodoo.

Defendant has the burden of proving by the preponderance of the evidence any date of use of VOODOO prior to the application date which appears on plaintiffs' registration of VOODOO.

Such proof should be more than mere oral allegations by defendant's president, Mr. Rolley, or any others who claimed to have bought or sold defendant's VOODOO products. Documentary proof with dates appearing thereon are ordinarily required by the Courts and the Patent Office to prevent guessing or fraud. All doubts are to be resolved against the newcomer in any claims of priority. The authorities are as follows:

In *Western Stove Co. v. Geo. D. Roper*, 82 Fed. Sup. 206, the D. C. S. D. California ruled for the intervener who had a registered trade mark. The Court said:

“Intervener's registration No. 437,191 is *prima facie* evidence of ownership (U.S.C. Title 15, Sec. 96) and where one claims ownership of a mark as against one who has registered the mark, the burden of proof is upon such claimant.”

In *Etalissements Rene Beziars v. Reid Murdock & Co.*, 9 USPQ 231, the U.S.C.C.P.A. held that a junior party attacking a registration has the burden to establish “by a preponderance of evidence” his claim of prior use and ownership.

In *Brewster v. Dairy Maid*, 62 Fed. 2nd 844, the CCPA held:

“The burden of proof is upon the junior party in a trade mark interference and all doubts must be resolved against him.”

In *R. R. Baker v. Lebow Bros.*, 66 USPQ 233, the CCPA said and held:

“It has become well settled law that one who seeks to prove priority of ownership and use of a trade mark over the application date of a registered mark must do so by a preponderance of the evidence * * * of course, against a registered mark all doubts must be resolved against the junior party * * * he is under a heavy burden and his proof must be clear and convincing.”

Defendant has admitted that it has no documentary or written proof of early sales of VOODOO products. In Mr. Rolley's discovery deposition it appears as follows on (R. 67-68):

Q. So that all the information you have is oral, only from your memory in regard to those early sales of VOODOO?

A. That's right.

Q, You don't have any written documents on the subject at all?

A. No.

Q. Do you have any record of sales?

A. No.

Q. Do you have any ledger?

A. Not that far back, no; I wouldn't keep my books after so many years.

Considering such facts with defendant's pleading in three places in its counterclaim that its first use of VOODOO was on April 15, 1940, (which is later than September 10, 1938, the application date in plaintiffs' registration of VOODOO which issued on January 3, 1939) leads to the conclusion that defendant was not prior to plaintiffs and could not sustain any burden of proving use of VOODOO prior to plaintiffs.

Let us examine defendant's testimony and the background for such testimony, and see if defendant has over-

come the presumption of plaintiffs' registration and filing dates.

**Defendant's Background Is Pertinent
As to Credibility of Its Proofs.**

Mr. Rolley admits that he entered the perfume business by copying wellknown perfumes (R. 125, 138, 139, 163, 164, 188, 189, 194-197). The names and trade marks of these well known perfumes Rolley put on his lists (R. 193-197), such as (PX 1) although he claims he put only numbers on the bottles (R. 163). He used the famous trade marks of others orally to sell his so-called reproductions (R. 189). By these subterfuges, Mr. Rolley thought he could trade on the marks of others with impunity, because he saw nothing wrong in such infringements and unfair competition, which he warmly defended in Court (R. 189, 194, 195).

This continued until 1943 when Mr. Rolley admits that he received complaints from attorneys for perfume houses whose trade marks he was infringing (R. 138, 139, 194, 195). It seems that in 1944 Mr. Rolley's infringements were so bad that they attracted the attention of the District Attorney (R. 194), who is in charge of criminal prosecution of trade mark infringers. Mr. Rolley's testimony on this point is enlightening, as follows:

“District Attorney * * * asked me to come down there and I did * * * questioned me and asked me why I was doing this * * * told me * * * (it) was illegal to use comparisons like I was doing, that is, to refer to any other name on a printed sheet of paper. * * * They asked me to destroy or get rid of these particular copies of papers you have had in evidence here (PX 1) and they wanted it done in twenty-four hours” (R. 194).

Mr. Rolley admits infringing such famous trade marks as SHALIMAR, CHANEL 5 (R. 188), TOUJOURS MOI

(R. 197), and TABU (R. 193). In plaintiffs' exhibit 1 which is a list of Rolley infringements, Mr. Gaumer testified that MANDALAY belonged to Palmer's, Ltd., BALLET to Hudnut, WICKED to Peggy Sage, CURTAIN CALL to Marie Richelieu, FORBIDDEN to plaintiffs, WHITE CHRISTMAS to Caron, and CLARE DE LUNE to Colgate (R. 100, 101). Coty even stopped Rolley from registration in view of its prior ownership of a mark (R. 106, 107).

Such background is pertinent to the case at bar because a man who has made a practice of taking other people's trade marks cannot very well plead innocence. As stated in *Penn Co. v. M. L. B. & T. Co.*, 72 Fed. 422:

“It is a well established rule of evidence that, where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same general subject-matter. The legal relevancy of such evidence is based on logical principles. It certainly diminishes the possibility that an innocent mistake was made in an untrue and misleading statement, to show similar but different misleading statements of the same person about the same matter, because it is less probable that one would make innocent mistakes of a false and misleading character in repeated instances than in one instance.”

The above citation was approved and quoted by Judge Wilkerson in *Elgin National Watch Co. v. Elgin Razor Corp.*, 25 Fed. Sup. 886.

With this background in mind, we come to Mr. Rolley's first signing of the cross complaint alleging under oath that his first use of VOODOO was on April 15, 1940 (R. 16-20). Between the time that he signed the counter-

claims, he saw plaintiffs' registration of VOODOO with its filing date of September 10, 1938, and its registration date of January 3, 1939, and he also saw his counsel (R. 203). Mr. Rolley then admits that he wanted to get a date ahead of plaintiffs' registration (R. 204). Under these circumstances, it is difficult to believe that Mr. Rolley made any use of VOODOO prior to plaintiffs' date on its VOODOO registration. Mr. Rolley made many changes of dates in his discovery deposition. Some were for more than five years. For instance, he testified he went into the perfume business in 1938, but made it 1933 when he signed the deposition (R. 205). Considering such testimony, it is difficult to believe any of Mr. Rolley's dates.

Defendant Made No Trade Mark Search Prior to Using Voodoo.

Mr. Rolley, in adopting trade marks, has made it a policy never to have a trade mark search made to determine whether the mark is already registered or whether it is available (R. 123). Perhaps this is because he started out with his list of famous perfumes, whose trade marks belonged to others.

At any event, Mr. Rolley had no search made of the trade mark VOODOO before he began using it (R. 133). Even if he had had a search made and had found plaintiffs' registration of VOODOO, he might not have respected it, because he made a practice of copying well-known trade marked perfumes (R. 133, 192). In fact he has boasted of copying two hundred of them (R. 193). Mr. Rolley himself admitted that he did not know what he would have done had he made a search which disclosed plaintiffs' VOODOO registration (R. 133). He finally admitted he would make such a search today (R. 219), but did not say he would respect plaintiffs' registrations.

Registration is, of course, constructive notice of ownership and use of a trade mark to the public. Constructive notice is a necessary doctrine to protect registrants like plaintiffs from defendants like Rolley, Inc.

The Trade Mark Act of 1946 specifies in Sec. 22:

“Registration of a mark on the principal register provided by this Act or under the Act of March 3, 1881 or the Act of February 20, 1905, shall be constructive notice of the registrant’s claim of ownership thereof.”

In *Willson v. Graphol*, 89 USPQ 382, registrations under the Act of 1905 have been construed as providing constructive notice.

An Analysis of Defendant’s Evidence Discloses That Defendant Has Not Sustained Its Burden of Proof of Any Date of Use of Voodoo Earlier Than Plaintiffs’ Registration.

All of defendant’s testimony as to use of VOODOO prior to 1943 is oral, vague, and incredible. After Mr. Rolley had sworn in defendant’s counterclaim that his earliest use of VOODOO was on April 15, 1940, he testified in his discovery deposition that he did not go into the perfume business until 1938. He said 1938 several times (R. 119, 120, 131). When he signed the deposition he changed the date 1938 to 1933 (R. 119, 120, 131). He claimed orally in his discovery deposition to have used VOODOO in 1938 (R. 127), but changed that to 1934 or 1935 when he signed the same (R. 127). He admitted that he had nothing to back up such oral claims and that the first papers he could produce on VOODOO sales were in 1943 and 1944 (R. 147-149).

As a matter of fact, Mr. Rolley was in the shoe dye business from 1930 to 1943 (R. 186). He testified that “later I

made some money selling perfumes, and when I got to that point I gave up the dye business” (R. 187). In 1940 Mr. Rolley was still in the dye business and Mrs. Anis did dyeing work for him (R. 258, 259). In 1943 he went into perfumes entirely (R. 259). This is confirmed because in 1943 we find the first documents on sales of perfume by Rolley (R. 150). The sale of Rolley’s perfumes up until 1943 was confined to Mr. Rolley’s store (R. 132). As late as Mr. Rolley’s discovery deposition in 1950, his VOODOO perfume was sold only in San Francisco in defendant’s store (R. 136). It was not on sale in any of the department stores in San Francisco (R. 136). Mr. Rolley admitted on cross-examination that he had no record of any sales of VOODOO perfume or cologne outside of San Francisco prior to 1943 (R. 136, 137).

The other witnesses do not help the defendant establish proof of priority by the preponderance of the evidence. There are six witnesses, but their testimony is valueless. Defendant desperately wanted to establish a date of use of VOODOO prior to September 10, 1938, the filing date of plaintiffs’ VOODOO registration which was issued by the United States Patent Office on January 3, 1939.

A thorough study of the record in this case does not disclose any documentary or credible proof of any use of VOODOO by defendant on perfume prior to either of the above dates in 1938 or 1939.

Anybody can orally state that he has used a trade mark before the date of a registered mark. But is it believable? Is it sufficient to knock out a registration duly issued and of record for more than twelve years?

Mr. Rolley, president of defendant corporation and its predecessor as an individual, was a fluent witness in his own behalf. He was really in the shoe dye business until

1943 (R. 169, 186), so that plaintiffs' registration for VOODOO was already four years old when Mr. Rolley really went into the perfume business.

While Mr. Rolley was making his living dyeing shoes and garments, he potted with face creams and perfumes according to Mr. Moreland (R. 224). He gave some free samples to a next door neighbor, a Miss Homilius (R. 241-243). But there is nothing documentary to establish that he ever used the trade mark VOODOO on perfume while he was in the dyeing business.

Mr. Rolley' oral statement that he first used VOODOO in 1934 or 1935 (R. 166) is purely self serving and unsupported. In fact, it is contradicted by defendant's own witness, Miss Homilius, who testified that at that time there were no names on any of the perfume bottles (R. 244), because Mr. Rolley used only numbers and that VOODOO was not on any bottles he gave to her (R. 242, 244).

In 1939, Mr. Rolley was still selling perfumes with numbers on them instead of trade marks (R. 237-240). This came out in the testimony of another of defendant's witnesses, a Mrs. Labhard. She testified that at that time she "made suede garments" (R. 234), and "Mr. Rolley was cleaning and dyeing suede garments and shoes" (R. 234). There was a display case, she said, containing some of Mrs. Labhard's suede garments and some of Rolley's dyes and a small display of perfume in Mr. Rolley's dyeing shop (R. 235). She testified:

"Q. Did you notice whether any of these containers of perfume had any name on them?

A. No, sir. So far as I recall there were no names. The perfumes were sold by numbers only then." (R. 235).

Even with leading questions by defendant's counsel as

to whether she saw a VOODOO label, Mrs. Labhard said on the stand: "I don't recall a label" (R. 237).

The credibility of any witness in a law suit may be the subject of examination. This is particularly true of a witness who is relying on purely oral testimony to upset a documentary registration (R. 148). The background of such a witness, his purposes, business practices and conduct are all important in determining whether or not the witness should be believed.

Mr. Rolley began by copying other famous perfumes and attracted business by selling at a lower price (R. 162). His customers wanted to buy "that particular perfume they had liked" (R. 163) "at a cheaper price than they were accustomed to paying" (R. 162). "That was a reproduction", admitted Mr. Rolley (R. 163).

Later Mr. Rolley says that he was "called upon by some representative of some perfumery association" (R. 164) and was advised that his selling of reproductions of famous perfumes "was of doubtful propriety" (R. 164). Mr. Rolley even admitted that he copied the famous trade marked perfumes such as TOUJOURS MOI, a product of Corday (R. 165), SHALIMAR and CHANEL NO. 5 (R. 188) and used their names (R. 188). He admitted putting out "a list of famous perfumes with the names of wellknown trade marks on that list" (R. 193). Mr. Rolley said "I have copied TABU" (R. 193). When questioned on such practices, Mr. Rolley said that "all department stores" and "practically every perfume saleslady" did the same thing (R. 188, 189). That, of course, is not true and does not excuse Mr. Rolley's conduct or release him from trade mark infringement and unfair competition. With such an attitude and such a background, Mr. Rolley's oral statements are subject to grave doubt and disbelief.

Mr. Rolley's claim of a 1934 use of VOODOO as a trade mark on perfume is not supported by any corroborating witnesses. He could not furnish the names and addresses of any purchasers (R. 146, 147). This is strange. Usually a man in a new business can remember vividly his early customers. A lawyer certainly never forgets the name of his first client. Mr. Rolley did mention a Mrs. Coffey and a mysterious woman who had married three times and was now in Sacramento (R. 167). Mrs. Coffee could not be checked and for all we know, was fictitious. The Sacramento woman was supposed to appear as a witness and we even delayed the hearing an extra day for her, but she never showed up (R. 266). Maybe she never existed, because Mr. Rolley could not even remember her name (R. 167). Mr. Rolley said Mrs. Wiggley was an early customer, and claimed she purchased from him in 1940 (R. 200), but his memory was several years ahead, because Mrs. Wiggley testified she had no dealings with Mr. Rolley until 1943 (R. 247).

When Mr. Rolley was pressed on cross-examination as to why he had picked the date of April 15, 1940, and swore to it in his answer as his first use of VOODOO, he said that it was purely his "oral guess" (R. 217).

In no place in his testimony does Mr. Rolley definitely state that he used VOODOO as a trade mark on perfume at any date prior to plaintiffs' registration of VOODOO in 1939.

The mere creation or coining of a word does not confer trade mark rights. Mrs. Rolley claims that she told her husband about VOODOO, and gives the amazing reason that she picked it as an oriental word for an oriental type of perfume (R. 269, 279). She went on to say that she read a lot and had read about a tribe practicing voodooism in the orient, and that suggested the oriental word VOO-

DOO (R. 279). VOODOO has, of course, nothing to do with the orient so that an article thereon would be as doubtful as Mrs. Rolley's explanation. One can only conclude that Mrs. Rolley's testimony is entitled to no more weight than that of any wife trying erroneously to help her husband.

Although Mr. and Mrs. Rolley claim they named one of Mr. Rolley's perfumes VOODOO in 1934, and Mrs. Rolley claims to have seen perfume so labelled, yet this is contradicted by the testimony of Miss Homilius, who said that Mr. Rolley used only numbers on his bottles (R. 242, 244). Five years later, in 1939, Mr. Rolley was still using only numbers on his perfume, according to defendant's witness, Mrs. Labhard (R. 235).

Defendant cannot acquire trade mark rights in VOODOO by using VOODOO orally or by telling friends about it or by discussing it with his wife. To set aside plaintiffs' registration of VOODOO, defendant will have to establish beyond a reasonable doubt that its predecessor Mr. Rolley used the name VOODOO on a label attached to a bottle and sold it in a bona fide sale. Orally calling a perfume VOODOO, talking about it to friends, giving free samples to neighbors, is not sufficient.

Mr. Moreland's testimony was evidently intended by the defendant to establish trade mark use of VOODOO in 1934. All that it amounted to was that the word VOODOO was discussed. When asked to fix the time when Mr. Rolley first actually used VOODOO as a trade mark on perfume, the witness said:

"As far as using the name is concerned, I don't know when he started using it. (R. 212) My contact with the (Rolley) retail business is practically zero. * * * I had no connection with the retail business whatsoever." (R. 228).

Mr. Moreland testified:

“Q. Can you tell us the date when you first saw a bottle of perfume bearing the name VOODOO on Mr. Rolley’s premises?”

“A. God, no, I couldn’t tell you that.”

Mr. Moreland then concluded:

“The retail side of the business I didn’t have any knowledge of.” (R. 231).

Miss Homilius, who got free samples of Mr. Rolley’s perfume in numbered bottles, testified:

“Q. You can’t testify here this morning on the stand as to any date when you ever received a bottle from Mr. Rolley that had the name VOODOO on it, can you?”

“A. No.” (R. 245).

There is no documentary proof of any sales of perfume bearing a VOODOO label by Mr. Rolley prior to plaintiffs’ filing and registration dates of 1938 and 1939. There is no credible proof of any such trade mark use of VOODOO on said goods by Mr. Rolley prior to plaintiffs’ 1938 and 1939 documentary dates. Defendant’s own proof establishes that Mr. Rolley used numbers on his perfume. There is no proof of any rights by defendant prior to those of plaintiffs of record in the United States Patent Office.

There is further testimony by defendant’s witnesses relating to dates in 1943, 1944 and later, such as Mr. Rolley’s testimony that he discontinued the shoe dye business in 1943 and that he had never made any but retail sales of perfume from his place of business prior to 1943 (R. 167-169). Mrs. Rolley admitted that she sold perfume for Mr. Rolley for the first time in 1943 (R. 278). Mrs. Anis, who did dyeing for Mr. Rolley in 1940, began selling perfume for him in 1943 (R. 257). She is the witness who claimed she could recognize invoices she had typed by just

looking at the typing (R. 259). This impossible feat merely disclosed her eagerness to help her employer. Mrs. Wiggley said she bought Mr. Rolley's perfume in 1943 (R. 248). But this testimony is all oral by interested witnesses including Mr. Rolley's wife, employee and friends. And it is all on dates many years subsequent to plaintiffs' filing and registration dates in 1938 and 1939.

There is no documentary or credible oral proof of prior use of VOODOO by Mr. Rolley as defendant's predecessor on perfume that pre-dates plaintiffs' registration of VOODOO in 1939.

Defendant admits that it has never had any advertising of VOODOO perfume or cologne except in its price lists (R. 137, 209, 210). Naturally, this would be true because defendant would ride on plaintiffs' extensive national and local advertising of their VOODOO perfume and cologne. After this suit had been filed, defendant placed one advertisement in the San Francisco Chronicle on September 27, 1951, offering SEA AND SKI cream for \$1.00 and a free bottle of VOODOO perfume (R. 209, 210). Perhaps defendant offered to give away its VOODOO perfume because it is an admittedly "slow seller" (R. 214). Such free gifts indicate strongly that defendant's VOODOO perfume is not really on bona fide sale and that said trade mark is of no value to defendant. Certainly, the purchasing public does not associate the trade mark VOODOO with defendant.

It is also interesting to note that for the last two years that defendant has not had enough interest in or sale of VOODOO to list it in its price lists (R. 211, 212). This again indicates that defendant has had no actual sale of VOODOO for over two years and that it is not listed as really being on sale by defendant at the present time.

Defendant's Claim That Plaintiffs Are Not Entitled to Rely on Their Trade Mark Registrations Is Without Merit.

Defendant claims that plaintiffs' registrations are not entitled to the presumptions of validity, ownership and use, to which they are entitled under the Act of 1946, and the authorities.

How can defendant say that plaintiffs are not entitled to the protection granted them by said registrations and under the law? Defendant did not challenge or attack plaintiffs' registrations in any way. Defendant did not cross-examine plaintiffs' witness and obtain any proof against the existence or validity of plaintiffs' registrations. Defendant did not offer any proof of its own to attack or destroy plaintiffs' registrations. Plaintiffs' testimony did not, of course, adversely affect plaintiffs' registrations in any way. Defendant did not prove that plaintiffs did not use VOODOO prior to registration. How can defendant say that plaintiffs' registration of VOODOO is invalid? There is not a single iota of proof by defendant along this line.

Defendant's brief does not and cannot contradict the Act of 1946. Mr. Rolley claimed orally that he first sold VOODOO perfume in 1934. However, Mr. Rolley's oral claims of priority were admittedly not corroborated by sales invoices, ledger sheets, label receipts, or records of any kind (R. 147, 148). On the other hand, Mrs. Labhard and Miss Homilius, defendant's own witnesses, in effect contradicted and impeached Mr. Rolley in testifying that from 1934 to 1939 Mr. Rolley used only numbers and did not use names as trade marks on his perfumes (R. 235, 244, 245).

In all of defendant's harangue against plaintiffs' registrations, defendant cites no authorities to explain how it

may avoid infringement under the specific terms of the Act of 1946, to the protective provisions of which plaintiffs are entitled.

In *Lehn & Fink v. Wyeth*, 77 USPQ 633, the law is stated.

“In the absence of contrary evidence, registration is *prima facie* evidence of registrant’s ownership and use of mark.”

There is no evidence to the contrary. There is no evidence attacking plaintiffs’ registrations. They are presumed to be valid, and further, to be owned and the mark used by the owner. That is the fact in this case. Plaintiffs’ registrations are owned by plaintiffs. They are valid and the presumptions of validity and use are unrebutted and on dates prior to defendant.

Defendant dislikes the requirement that it has the burden of establishing ownership and use over one who owns a registration for such mark. Such a rule is necessary. Otherwise, we would have situations wherein one who had taken the trouble and expense to register a mark and given notice to all, of his rights thereto, could be deprived of his rights by any unsupported oral claim of priority. Proof of priority under such circumstances must be by the preponderance of the evidence, and all doubts must be resolved against the later claimant. Such is the law set forth in the California case of *Western Stove Company v. George D. Roper*, 82 Fed. 2nd 206.

Certainly defendant is the junior party who is attacking the registration. It has not met the proof required by it under the authorities to overcome plaintiffs’ registrations.

Defendant Mistakenly Claims That Plaintiffs' Voodoo Registration Has Expired. It Has Not Expired and Is in Full Force and Effect.

Plaintiffs must correct defendant's statement on page 33 of defendant's brief that "The asserted registration under the 1905 Act would have expired on January 3, 1949 (ten years)." This is not true.

Plaintiffs' registration No. 363,746 for the trade mark VOODOO was issued on January 3, 1939, by the United States Patent Office. A certified copy of this registration offered and received in evidence as plaintiffs' Exhibit 8 (R. 80), shows on its face that "The certificate of registration was granted for the term of twenty years and so far as is disclosed by the records of the office, said certificate is still in full force and effect."

The Act of February 20, 1905, Section 12, under which registration No. 363,746 for VOODOO was issued provided (U.S.C. Title 15, Sec. 92) "That a certificate of registration shall remain in force for twenty years."

Registration No. 363,746 for VOODOO, having issued on January 3, 1939, did not expire on January 3, 1949, and will not expire until January 3, 1959. It was during all of 1949 and still is in full force and effect.

Defendant also mistakenly urges on page 33 of its brief that plaintiffs' registration No. 363,746 for VOODOO was not entitled to republication under the Act of 1946. Again, this is not true. The citation of 15 USCA 1062 states that the owner of a trade mark registration obtained under the Act of 1905 may file "at any time prior to the expiration of the registration" to obtain the benefits of the Act of 1946. Plaintiffs' registration No. 363,746 for VOODOO had not expired on March 11, 1949, when plaintiffs filed under the Act of 1946. On August 9, 1949, when registra-

tion No. 363,746 for VOODOO was republished under the Act of 1946, plaintiffs' said registration became entitled to all of the benefits of the Act of 1946. The 1946 Act did not cut short plaintiffs' registration, so that defendant's statement on page 33 of its brief that "Apparently all claims under the asserted 1939 certificate have lapsed and expired" is false and misleading to the Court.

The California and Federal Cases Cited by Defendant Require That Plaintiffs' Registrations Be Sustained.

Defendant, confronted with plaintiffs' trade mark registrations, attempts to argue that they are a nullity on pages 35-41 of its brief. Defendant cites several California cases, all of which sustain plaintiffs' position.

The first of these cases is *Derringer v. Plate*, 29 Cal. 292, in which the Supreme Court of California sustained a common law trade mark on Derringer for pistols, and held that, even though plaintiff was in Philadelphia and defendant was in San Francisco, that defendant's use of Derringer on the same goods constituted infringement. The defendant's demurrer had been sustained below on the ground that plaintiff had had no registration in California and that registration was necessary. The Supreme Court ruled that plaintiff could prevail on his common law rights but that through registration of a trade mark, "its enjoyment may be better secured and guarded, and infringements upon the rights of the proprietor may be more effectually prevented and redressed by the aid of statute than at common law."

In *Weatherford v. Eytchison*, 90 C.A. (2d) 379, the Court cited *Derringer v. Plate*, *supra* and said that the California registration statute is "an affirmance of the common law."

In *Cole of California v. Grayson*, 72 C.A. (2d) 772, the Court restrained defendant from further use of SWOONER on apparel as an infringement of plaintiff's trade mark SWOONER on bobby sox. The plaintiff had registered the trade mark SWOONER in California and the Court held that while registration was not compulsory that such registration did "lend support to the finding that plaintiff had appropriated said trade mark in connection with the merchandise it manufactured and sold."

The Court further said:

"The certificate thereafter issued to the plaintiff by the Secretary of State constituted a registration of the trade mark under Section 14237 of the Business and Professions Code and such registration 'is prima facie evidence of the ownership of the mark' by the express terms of Section 14271 of said code."

The remaining California cases of *Rainier Brewing Co. v. McCalagon*, 94 C.A. (2d) 118, relates to receivership sales of trade marks.

Of the Federal cases cited by defendant, *Pecheur Co. v. National Co.*, 315 US 666 held that where there were no registrations that the action became one of common law unfair competition. The Trade Mark Cases, 100 US 82, related to criminal action under the Trade Mark Act of 1870, not involved in this case. *American Trading Co. v. H. E. Hancock*, 285 US 247, involved the Philippine Islands Trade Mark Act, and *United Drug Co. v. Rectanus*, 248 US 90, related to common law marks and the Act of 1881. None of these is pertinent to this case which involves the Acts of 1946 and 1905.

Before plaintiffs' registrations were granted by the United States Patent Office, plaintiffs satisfied the highly exacting and critical requirements of this expert government agency as to adoption and use. Such applications

are exhaustively searched and prior to registration are published for opposition. This publication permits anyone claiming prior rights thereto to object and present his evidence. Defendant filed no opposition. No others objected upon publication and plaintiffs' registrations were duly granted. They then became entitled to all of the benefits and presumptions of the Act of 1905 under which they were granted. Upon republication under the Act of 1946, plaintiffs have become and are now entitled to all of the benefits and presumptions of the Act of 1946. These cannot be wiped out by defendant's flimsy oral claims of priority, or by the unsupported argument of defendant's counsel that registrations confer no rights.

Plaintiffs cite the case of *McLellan Stores Co. v. Conrad & Co., Inc.*, 18 F. 2d 826, wherein the Court of Appeals for the District of Columbia held that a registration granted by the Patent Office is *prima facie* evidence of ownership during the entire twenty year period for which the registration is granted, saying:

“Section 16 of the Trade Mark Act provides ‘that the registration of a trade mark under the provisions of this act shall be *prima facie* evidence of ownership’. * * * Applicant contends that the *prima facie* presumption of ownership does not extend beyond the date of registration. * * *

“This contention was rejected by the Patent Office, and we think, correctly. Section 12 of the Trade Mark Act provides that a certificate of registration shall remain in force for twenty years. * * * Taking these provisions together, as we must, it is apparent that Congress intended that the owner of a mark should enjoy a continuing presumption of ownership during the life of the registration.’”

Plaintiffs' registrations stand unexpired, un rebutted, and in full force and effect. They confirm plaintiffs' com-

mon law rights and have established presumptions as to use, ownership, and validity by plaintiffs, under the Acts of 1905 and 1946 and the authorities.

Pertinent Cases of This Court, The Supreme Court of the United States, and Other Courts of Appeal Sustain Plaintiffs' Position.

In *Stork Restaurant, Inc. v. Sabatini*, 76 USPQ 374, this Court said:

“The decisions frequently refer to this sort of imitation as ‘reaping where one has not sown’ or as ‘riding the coattails of the senior appropriator of the mark.’

“By whatever name it is called, equity frowns upon such business methods and in proper cases will grant an injunction to the rightful user of the trade mark.”

In *Del Monte Special Food Co. v. California Packing Corp.*, 34 Fed. 2d 774, this Court restrained defendant from using DEL MONTE on oleomargarine in view of plaintiffs' prior and extensive use of DEL MONTE on food products because “the only motive for the adoption of the same brand is to get the advantage of appellee's name, reputation and good will.”

In *Safeway Stores, Inc. v. Dunnell*, 80 USPQ 115, this Court enjoined defendant's use of SAFE WAY on toilet seat covers in view of plaintiff's great use of SAFEWAY in its grocery stores. In the *Safeway* case as in the case at bar, the defendant knew of plaintiff's trade mark before beginning the infringing use.

In *Lentheric v. Willingmyre*, 45 USPQ 687, the District Court for New Jersey enjoined the defendant from repackaging plaintiff's merchandise and using plaintiff's trade mark because “the good will of plaintiff should not be injured in this way and the purchasing public should not be deceived or misled.”

In *Mishawaka Co. v. Kresge Co.*, 316 U.S. 203, the Supreme Court of the United States in affirming an injunction restraining the defendant from trade mark infringement said, "A trade mark is a merchandising short cut which induces a purchaser to select what he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of this market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is obtained, the trade mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."

In *California Fruit Growers v. Windsor Beverage*, 118 F. (2d) 149, the C. C. A. 7, in restraining infringement of the trade mark "SUNKIST" said, "If the trade mark is the same or similar and the merchandise such as reasonably may be attributed to plaintiff, deceit results. Plaintiff's having a property right in a trade mark may prevent others from enjoying that property right. * * * If defendants are not restrained, into the hands of the retailer comes an unlawful instrument which enables him to increase his sales of the dishonest goods, thereby lessening the market for the honest product. This the law will not permit."

**The Purchasing Public Associates Tabu,
Forbidden and Voodoo with Plaintiffs.**

Defendant argues that plaintiffs are not entitled to relief because they were originally small concerns. Defendant argues that plaintiffs' early sales were trifling in amount.

Defendant apparently feels that there is some stigma in starting a business from scratch and gradually working up to an accepted success. The story of plaintiffs is that of any successful American enterprise—namely, a small beginning and then coming up the hard way with products of their own to a gradual success, and recognition in the industry. What is wrong with that?

Plaintiffs' success in the perfume field is very important with relation to its trade marks in issue in this case. A trade mark is an important factor in the sale of perfumes. It may be the most important factor. Mr. Rolley has admitted that this is true (R. 139).

A trade mark is a commercial signature by which a pleased customer, or a new one, may obtain a desired product. Naturally, the greater the use of the trade mark, by means of advertising and sales, the greater the value of the trade mark, and the more likelihood there is of its being infringed. It is important in every case to show the extent to which the trade mark is in current and past use. That is why plaintiffs' testimony brought out that over two million dollars have been spent advertising plaintiffs' trade marked perfumes (R. 96), and that there have been over thirty-two million dollars in sales of said products (R. 90). Typical of plaintiffs' advertising is in evidence as plaintiffs' Exhibits 24-41 (R. 92). In VOODOO perfume and cologne alone plaintiffs' sales have exceeded over a quarter of a million dollars (R. 90). Plaintiffs' TABU and VOODOO cosmetics are on sale "in all the principal stores in California, Oregon and Washington" and "from coast to coast, in every city in the Union" (R. 90).

Just think of the good will connected with such sales. What does the purchasing public think of when it buys VOODOO? Does it think of defendant, who has not listed

its perfume for over two years? Does it think of defendant who has never advertised its VOODOO perfume, outside of the advertisement in which VOODOO was given away free with a purchase of another of defendant's products? Certainly the purchasing public does not think of defendant or its product. It does not know defendant, or defendant's product. It has heard of plaintiffs' VOODOO, and if it wants to buy VOODOO, it goes into any well known department store in California or elsewhere and buys plaintiffs' product.

Defendant says that plaintiffs are not selling perfume, but are brokers in trade marks. Plaintiffs are all related companies (R. 97). Plaintiffs' advertising and sales of their TABU, FORBIDDEN and VOODOO cosmetics extending into the millions refutes such claims.

Until 1943 Mr. Rolley claims he sold only retail (R. 132). Defendant's VOODOO is not now on sale in any San Francisco department store (R. 136). Compare that showing with the extensive sales of VOODOO made by the plaintiffs. Compare defendant's unsupported oral claim of use of VOODOO with plaintiffs' registration. Compare the lack of good will of defendant in VOODOO with the vast good will in said trade mark which the purchasing public and stores associate with plaintiffs.

**Plaintiffs Not Only Have Registrations With Prior Dates
But Their Products Have Been Sold and Are Now Being
Sold in California and Throughout the United States.**

Plaintiffs' registration of TABU goes back to 1934. (PX 2, R. 75). The VOODOO registration is dated 1938. These are documentary dates, not subject to a witness's oral guess, prejudice or mistake. They are established beyond doubt.

In addition, plaintiffs produced invoices showing sales of plaintiffs' trade marked products for 1943 to date (PX 85), in California and other parts of the country (R. 97-99). Sales prior to the dates of these invoices were made in Texas, California, Ohio, New York, and other places (R. 98).

The national and extensive advertising and sale of plaintiffs' TABU and VOODOO perfumes and colognes are established in the record (R. 89-90). Every department store in the San Francisco and the West Coast area carries and has carried plaintiffs' VOODOO and TABU perfumes and colognes (R. 89-91).

Mr. Rolley admits that a trade mark is an important factor in the sale of perfumes, and that a perfume becomes known by its advertising and sales and by its trade mark (R. 139). Since defendant's VOODOO product has been a slow seller (R. 214), and is given away with a purchase of another product (R. 209), it is difficult to see how defendant can claim that VOODOO indicates defendant's products. It is so unknown that it is not on sale in any San Francisco department store (R. 136) and has not even been listed for the last two years in defendant's own list (R. 212). Defendant has no good will in the trade mark VOODOO. On the other hand, because of plaintiffs' priority, extensive advertising, sale and use of VOODOO or its products, the trade mark has come to indicate only plaintiffs' products to the stores and the purchasing public. Plaintiffs and the purchasing public should be protected against defendant's infringing use of VOODOO.

Plaintiffs' Trade Marks Have Been Adjudicated by the Courts and Recognized by the Trade.

Plaintiffs' trade marks have been recognized by the Courts, the Patent Office and the trade.

The United States District Court for the Northern District of Illinois entered decisions sustaining plaintiffs' registered trade marks TABU and FORBIDDEN and issued injunctions restraining infringement thereof, as shown by certified copies offered in evidence as plaintiffs' exhibits 91, 92 and 93 (R. 103-105). The United States Patent Office denied registration of FORBIDDEN SECRET to the Lander Company as confusingly similar to plaintiffs' TABU and FORBIDDEN as shown by the decision offered in evidence as plaintiffs' Exhibit 90 (R. 104).

VOODOO, plaintiffs' registered trade mark was sustained and VOODOO BROWN restrained as an infringement thereof by the United States District Court for the Southern District of New York as shown in plaintiffs' Exhibit 94 (R. 105, 106). Two other VOODOO infringers avoided litigation by entering into settlement agreements with the plaintiff as shown in plaintiffs' Exhibits 95 and 96 (R. 106, 107).

This is strong evidence of the validity of plaintiffs' trade marks and indicative that these marks have the respect of the Court and the United States Patent Office and the acquiescence of competitors in the perfume trade.

Defendant's Counterclaim on Voodoo Is Without Basis And Should Be Dismissed.

When defendant's counterclaim was filed, defendant and defendant's counsel could not have been serious, because they alleged defendant's earliest use of VOODOO as April

15, 1940, which was later than plaintiffs' registration date of VOODOO in 1939 (R. 16-19).

At the trial, defendant's counsel sought to amend the 1940 date to 1934, without explanation (R. 71). This amendment was not granted (R. 71-72).

We have seen that the only data as to 1934 is Mr. Rolley's unsupported and oral claim of use of VOODOO, contradicted by two of defendant's own witnesses, Mrs. Labhard and Miss Homilius. They testified that in 1934 and still in 1939 Mr. Rolley was still using only numbers on his perfumes and used no trade marks or names thereon (R. 240, 244, 245).

Until the beginning of the year 1943, all (Mr. Rolley's) cosmetic sales were at retail for cash at his retail establishment in San Francisco" (R. 132). Such sales must have been very small because Mr. Rolley was in the shoe dyeing business and apparently had only one assistant, a Mrs. Anis from 1940 on (R. 251, 256). Mr. Rolley produced no person to testify that he or she bought perfume bearing a VOODOO label prior to 1943, although all sales, if any, prior to 1943 were made in San Francisco.

Defendant on page 10 of its brief claims that sales after 1943 by Mr. Rolley were extensive, but does not recite any amounts. Defendant admits that sales were confined to the three Pacific Coast stores, two territories and the District of Columbia (Pages 1 and 2 of defendant's brief). In fact, at the trial defendant's counsel indicated that an injunction covering only such territory would be sufficient to protect defendant.

Based on nothing but oral and contradicted proof of use of VOODOO as a trade mark on perfume prior to 1943, and long subsequent to plaintiffs' registration of

VOODOO in 1939, it is absurd for defendant to ask for an injunction.

Defendant's sales of VODOO must have been small because Mr. Rolley admitted that it was "a slow seller" (R. 214). It had never been advertised (R. 137, 209), until in one advertisement in 1951 for another product defendant offered to give away free a bottle of VODOO perfume (R. 137, 209). VODOO is not even included in defendant's current list of perfumes (R. 211, 212), which indicates that it has actually been dropped by defendant. Even without considering plaintiffs' rights, under such circumstances, what good will is there in defendant's claim to VODOO to protect by injunction? In addition, plaintiffs have a registered trade mark on VODOO which is entitled to be sustained.

Defendant's request for an injunction should be denied and its counterclaim dismissed with costs assessed against defendant.

The Preliminary Injunction Issued by Judge Erskine Restraining Defendant from Suing Any of Plaintiffs' Customers for Alleged Infringement of Voodoo and Made A Permanent Injunction by Judge Roche After Trial Should Be Affirmed.

At the time defendant filed its answer in this case, defendant improperly obtained, without serving notice on plaintiffs, an ex parte order dated June 7, 1950, to join twenty-one of plaintiffs' customers as parties to its cross complaint (R. 10, 11). These twenty-one customers of plaintiffs consisted of the following important stores: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, all in Los Angeles; Saks, Wilshire Blvd., Beverly Hills; Emporium, Macy's, I. Magnin's, Hale Bros., City of Paris, H. Lieben & Co., J. Magnin's, Raphael

Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell's, Sullivan & Furth, Capwell's, Kahn's and I. Magnin's, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento (R. 10, 11).

Immediately upon learning of such ex parte order, plaintiffs filed a motion to vacate it and to strike the names of such stores from defendant's cross complaint.

Plaintiffs also filed a motion for preliminary injunction to restrain defendant from proceeding against said twenty-one customers of plaintiffs and from filing suit against any of plaintiffs' customers (R. 21-23). In support of this motion, plaintiffs filed the affidavit of John D. Gaumer, who set forth plaintiffs' registrations of VOODOO, their extensive advertising and sale throughout the United States and in California, including the twenty-one stores which defendant desired to sue (R. 24-29). Mr. Gaumer further stated that long after plaintiffs had obtained registration of VOODOO that defendant began the infringing sale of VOODOO perfume, that defendant had no rights to said trade mark, and that joining suit against said twenty-one customers was designed to harass plaintiffs and their customers. Mr. Gaumer's affidavit is set out in full in the Record (R. 24-29).

The matter was briefed and the authorities presented to His Honor, Judge Erskine. A leading case on the subject is that of *Maytag Co. v. Meadows Mfg. Co.*, 35 Fed. (2d) 403. The Court of Appeals for the Seventh Circuit there affirmed the granting of such an injunction saying that:

“The Court was justified in restraining the bringing of a multiplicity of suits which might result in irreparable injury to the appellee.” “

The matter was orally argued before the Court upon the record and the briefs thereon; after taking the case under advisement, Judge Erskine ruled in favor of plaintiffs (R. 31-33). His Honor entered two orders on December 28, 1950. One order set aside the *ex parte* order of June 7, 1950, and stated:

“As noted in the case of *Maytag Co. v. Meadows Mfg. Co.*, 35 F. (2d) 403, 410, ‘Public policy favors the rule that litigation for the purpose of ascertaining and sustaining alleged rights of a * * * manufacturer should be brought against the alleged wrongful manufacturer and that suits against the latter’s customers for the same relief should be restrained until the original suit shall be determined.’”

Judge Erskine’s other order granted plaintiffs’ motion for a preliminary injunction. It is set out in full in the record (R. 31-33).

During the trial, the testimony further sustained plaintiffs’ position. Mr. Gaumer testified that all of the twenty-one stores which defendant had endeavored to sue were plaintiffs’ customers selling plaintiffs’ VOODOO and TABU perfumes and colognes (R. 89, 90). On examination, Mr. Rolley testified (R. 135-136), that defendant had never sold VOODOO perfume to any of their stores.

In view of this showing and the authorities, plaintiffs request that the preliminary injunction issued by Judge Erskine be made permanent in this case.

**Defendant Had A Fair Trial. There Was No Prejudice
in the Decision of the District Court.**

Defendant argues throughout its brief, that the District Court was prejudiced by inadmissible material, on which some kind of a Statute of Limitations had run, and that a new trial should have been granted.

No Statute of Limitations or claim of laches can be seriously urged in this case. The evidence of which defendant complains was properly admitted under the cases set forth on page 21 of this brief.

This was a trial before the Court without a jury. The Court was certainly not affected by any improper evidence and gave proper consideration to the evidence presented. If any improper evidence was let in, it comes under the heading of harmless error and as such is specifically not a ground for new trial.

Rule 61 of the Rules of Civil Procedure for the United States District Court states: "No error in either the admission or the exclusion of evidence * * * is ground for granting a new trial."

Defendant seems to feel that the statements of the District Court denying defendant's motion for a new trial show prejudice against defendant. The Court's remarks set out in full in the record, (R. 281-282), show that defendant lost because it infringed plaintiffs' marks. The Court said that the defendant "clearly violated the law." Defendant's counsel then specifically asked the Court "With respect to VOODOO?" and the Court answered, "Yes". This shows the Court ruled on the evidence on VOODOO, and was not prejudiced.

It is fundamental that the District Court Judge who saw and heard the witnesses, had the best opportunity of evaluating their testimony. In the absence of manifest error, his findings should be accepted. Defendant has shown no mistake of fact or law in this case.

Defendant had a fair trial, and fair consideration of its motion for a new trial. It has no basis to complain of the decision against it, by the District Court.

CONCLUSION.

In all trade mark cases, it is necessary for the plaintiffs to show that defendants are using a trade mark confusingly similar to plaintiffs, that the goods of both parties are in the same general class and that plaintiffs' dates are earlier.

In the case at bar, there is no dispute about the marks because VOODOO used by defendant is an infringement of plaintiffs' VOODOO. The marks are identical. FORBIDDEN FLAME taken by defendant is confusingly similar to plaintiffs' FORBIDDEN and the synonymous TABU. The goods of all the parties are perfumes and cosmetics, so that there is no question as to similarity of the merchandise. The dates of plaintiffs' VOODOO and TABU registrations in 1938 and 1934 are far earlier than any dates established by defendant.

Therefore, since defendant has used confusingly similar marks to those of plaintiffs on the same class of goods, at later dates than those of plaintiffs', plaintiffs are entitled to prevail.

Since defendant does not dispute the goods or marks, let us examine more in detail the matter of dates.

Plaintiffs' registration of TABU was issued by the United States Patent Office on July 3, 1934. Defendant's earliest claim of use of FORBIDDEN FLAME was in 1939. Plaintiffs unquestionably have the earlier date.

Plaintiffs filed their application for registration of VOODOO in the United States Patent Office on September 10, 1938. After meeting the exacting requirements of the Patent Office, and subsequent to an exhaustive search of prior marks by the Patent Office, plaintiffs' application was published. No one, including defendant,

claimed prior rights or opposed, and plaintiffs' registration of VOODOO was granted on January 3, 1939.

Plaintiffs' registration of TABU, FORBIDDEN and VOODOO are existing, unexpired and in full force and effect. They were duly republished under the Act of 1946 and are entitled to all of the benefits of that Act. Plaintiffs' registrations are *prima facie* evidence of ownership, validity, and of plaintiffs' exclusive right to the use of said trade marks. Such evidence has not been rebutted by defendant, who did not attack plaintiffs' registrations nor present credible evidence of priority sufficient to overcome the evidence established by plaintiffs' registrations.

Mr. Rolley's claim of use of VOODOO in 1934 is oral and unsupported. It is challenged by plaintiffs who point out that two of Mr. Rolley's own witnesses, Mrs. Labhard and Miss Homilius contradicted Mr. Rolley and said that he used only numbers in 1934 and 1939 to designate his perfumes. Since he used numbers and did not use names, he did not use VOODOO as a trade mark on his perfumes.

Mr. Rolley produced no documentary proof. He offered no books, ledgers, sales invoices or label receipts to support his claim of use prior to plaintiffs' registration date of 1939. Mr. Rolley produced no witness who had made a bona fide purchase of any perfume bearing VOODOO as a trade mark thereon prior to 1943. This is more than four years after plaintiffs' registered date. Since all of Mr. Rolley's sales of perfume prior to 1943 were made in San Francisco, it is strange that he could not produce a single witness to prove an earlier sale of VOODOO. He could not even remember the name of the woman from Sacramento who is supposed to have bought from him, but who never appeared to testify at

the trial. Mr. Rolley could not produce such a witness. because he had not used VOODOO as a trade mark on perfume. He had used only numbers on the reproductions of famous perfumes which he admitted he had sold. The use of numbers on bottles is an old expedient of trade mark pirates who refer orally to well known trade marks of others in selling their infringing goods. Mr. Rolley's testimony as to any date earlier than plaintiffs' registration is self serving, oral, unsupported, contradicted, incredible and entitled to no weight whatsoever.

Defendant could not acquire trade mark rights by discussing VOODOO orally with friends or with his wife. Priority may be established only by corroborated proof of actual bona fide sales of goods on which the trade mark is used.

Mr. Rolley admits that until 1943 all sales of VOODOO were made at retail in San Francisco. After 1943 defendant claims that sales were made only in the three Pacific coast states, Alaska, Hawaii and the District of Columbia. No sales were made to the rest of the country. VOODOO perfume has never been advertised by defendant except in one recent advertisement in which a bottle of VOODOO perfume was offered free with purchase of another of defendant's cosmetics. The only place where defendant's VOODOO perfume was possibly on sale at the time of the trial was at defendant's store in San Francisco. It is on sale in none of the department stores in San Francisco or elsewhere. Defendant admits that its VOODOO perfume has been a slow seller. Defendant has not even included VOODOO in its current list of perfumes and has omitted VOODOO on such lists for more than two years. Sales are either nil, or so few that any good will that VOODOO has now associated with defendant must be dismissed as negligible.

On the other hand, plaintiffs' VOODOO perfume is on sale in every important department and drug store in the San Francisco area and throughout the United States. Sales and advertising of plaintiffs' VOODOO have been so extensive that practically every woman and store knows of plaintiffs' VOODOO products. The tremendous good will of such trade mark is associated with plaintiffs.

The California cases sustain plaintiffs' position that plaintiffs' registrations are valid and entitled to be sustained because defendant has not established priority by credible evidence. Defendant's evidence has merely amounted to admissions of infringement.

Plaintiffs respectfully submit that the decision of the District Court should be affirmed and this appeal dismissed with costs.

Respectfully submitted,

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No. 13,389

United States Court of Appeals
For the Ninth Circuit

ROLLEY, INC.,

Appellant,

VS.

JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing
business as Consolidated Cosmetics
and Les Parfums de Dana, Inc.,

Appellees.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

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**United States Court of Appeals
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ROLLEY, INC.,

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JAMES L. YOUNGHUSBAND and HOWARD
YOUNGHUSBAND, co-partners, doing
business as Consolidated Cosmetics
and Les Parfums de Dana, Inc.,

Appellees.

**Appeal from the United States District Court for the Northern
District of California, Southern Division.**

APPELLANT'S CLOSING BRIEF.

PART ONE: PRELIMINARY STATEMENT.

Appellant is in receipt of copy of appellees' memorandum and submits its reply.

Appellees neither answer nor challenge appellant's statement of the case, the questions presented nor its analysis of the principles of law and equity to be applied herein. For this reason, we submit these matters upon appellant's opening brief and proceed directly to an analysis of appellees' discussion for such assistance as it may be.

PART TWO: ANALYSIS OF APPELLEES' BRIEF.**I.****APPELLEES' REMARKS CONSIDERED, CATEGORICALLY.**

Appellees' memorandum will be of little value as an aid to decision herein for it cites neither fact nor precedent, nor any principle in support of the judgment below.

On the contrary, appellees perversely persist in arguing a case for the protection of TABU which is not involved and as to which neither an injunction nor any other relief was ordered. It is necessarily inferred, therefore, that appellees' intransigence in intruding a case that never existed is occasioned by their lack of valid comment upon the facts, issues and questions made by *the* record!

Appellant, admittedly, has never used nor threatened to use TABU or any variant or equivalent thereof in any connection, at any time, or in any manner. Yet, on at least 18 of the 51 pages of the memorandum, TABU is argued and reargued!

We respectfully submit appellees' submission, for these reasons, trifles the attention of the Court.

Appellees' presentation is further weakened by the pervading cynicism that mere bigness should prevail without regard to right, priority of appropriation and use of a trade-mark, or any other consideration recognized by law, much distasteful "name dropping", and fascination with large sums of money.

Since this attitude has no place in serious advocacy and cannot be expected to influence the Court in its

deliberations herein, we take no further notice of these extraneous, immaterial and distasteful remarks.

II.

APPELLEES' REMARKS CONSIDERED, SERIATIM.

A. APPELLEES' "STATEMENT OF THE CASE".

(pp. 3-4.)

Of the purportedly factual remarks at this place, it is necessary to note only three, namely that: (1) appellant "is dominated by its president"; (2) appellant's predecessor "copied" TABU; and (3) appellant's predecessor infringed TABU by the use (until 1943) of FORBIDDEN FLAME prior to the registration of FORBIDDEN (August 15, 1944, PX 100).

As to the first item, we do not apprehend the materiality of the point nor precisely what appellees intend by "domination" of appellant by its president. In any event the record (TR 112-113) is that Mr. Rolley owns 5,000 of the 8,250 issued shares and serves as president and manager subject to "permission of the board of directors."

Secondly, the reference to TABU—if material at all—is answered by the exclusive reference to the subject in this record as follows (TR 193-194):

"Q. Did you ever copy Tabu perfume?"

A. I have copied Tabu. I have copied about 200 different perfumes in my *experiments*.

Q. Did you ever have anybody come to you with Tabu perfume and ask you to *make a reproduction of it*?

A. *No, sir.*

Q. But you have copied it?

A. I have copied about 200 different perfumes in my *experiments*."

Neither the proof nor the decree suggests any infringement respecting TABU and that should have eliminated this item from further comment.

The appropriation of FORBIDDEN FLAME by appellant's predecessor can have no bearing, as its use was discontinued three years (in 1943) before appellant's existence (1946) and Mr. Rolley's use was prior to registration (August 15, 1944) or asserted appropriation by appellees (March 1, 1944, PX 100).

If appellees contend that TABU and FORBIDDEN are synonymous and interchangeable, then they stultify themselves—for it would be an obvious fraud upon the registration system to seek registration of FORBIDDEN if that name did not qualify as a trade-mark.

Appellees' summary of the findings (page 4) demonstrates the deficiency in the decree—transposed from appellees' complaint—that appellant has indeed used the mark VOODOO "later than the first use of the trade-mark" by appellees, *without, however, any finding whatever with respect to the prior appropriation by appellant's predecessor*. Appellees' own summation cannot avoid the patent and fatal negative pregnant in their pleading and decree!

In their statement of the questions presented, appellees plainly dissemble in suggesting that the in-

stant decree restrains appellant from a non-existent infringement of TABU and FORBIDDEN—because neither mark is anywhere mentioned or referred to in the decree (TR 45-47) or in the writ of injunction (TR 56-58).

B. APPELLEES' "ARGUMENT".

(pp. 5-48.)

1. Appellees' "Title" (pp. 5-6).

Appellees here repeat that they "own certain registration certificates," including only one here involved, but seek to accomplish a misrepresentation (page 5) as to ownership of the trade-mark VOODOO by a partial quotation of a stipulation designed to shorten the trial.

Appellant did *not* concede appellees' *title* to VOODOO and the representation to that effect is a fraud upon the Court and upon appellant. The cited statement, partially quoted by appellees, reads in full (TR 80):

"The Court. This is Voodoo?"

Mr. McKnight. Yes.

Mr. Hutchinson. Same objection on that, your Honor, with this further qualification, that the *registration without use does not prove any issue* in the case, and would not sustain judgment for the plaintiff.

The Court. I don't follow that clearly.

Mr. Hutchinson. This is with relation to Voodoo and *registration for Voodoo*. We do not challenge they have the certificate here, and do not raise any objection as to the foundation, but we think it is incompetent, irrelevant and imma-

terial, *because it does not establish the issues, which is prior use or, for that matter, any use.*"

The quotation from the Lanham Act (15 USCA 280 at pages 6-7) does support the judgment for that legislation merely declares that—

“. . . no rights may be claimed in the mark of another who *commenced* to use it *after* the *registration* issued . . .”

and the fact in this case is that appellant had used the trade-mark for more than one year before that act became law and more than three years before re-registration under the Lanham Act, its predecessor having used that mark for five years before any registration!

2. The sales of TABU, FORBIDDEN and VOODOO by appellees (pp. 7-8).

At this place appellees again resort to boastful name dropping—but with it all do not disclose to the Court the date, much less the first date, of any sale of VOODOO in the places mentioned and, at all times, *aggregate three marks*: TABU, FORBIDDEN and VOODOO, so that their argument, if they have one, is lost by their own diffusion.

The millions they discourse upon should certainly have produced *some evidence* of some specific use of VOODOO as a trade-mark *prior to 1949, if, in fact, it had ever been so used by appellees.*

3. The further references to TABU, etc. (pp. 9-12).

At this place, appellees further luxuriate in the dead issue of FORBIDDEN FLAME and conclude with a quite inexplicable attack upon the Court below for not having enjoined nonexistent infringement on TABU (page 12)!

At this point we are, like Alice, "too much puzzled to make any other remark."¹

4. The claim registration is prima facie evidence of ownership and use (pp. 13-17).

It seems to us entirely futile to labor over the subject of "a prima facie case" when there has been plenary proof upon an issue.

Further, no conclusion derivable from a registration can be played back to a time before the date of appropriation claimed in the registration application, September 10, 1938, in the case of VOODOO.

Appellant's unchallenged proof is that the appropriation and use it may claim antedates appellees' claim to priority by four years or more.

Lest it be forgotten, it is noted that *plenary proof of appropriation and use in 1934*, and subsequently, is contained in *Mr. Rolley's deposition* in discovery, which appellees insisted upon reading into the record, as *a part of appellees' case in chief*, over appellant's timely objection. *This became appellees' evidence and they made no offer to impeach or counter it!*

¹Through The Looking Glass, Lewis Carroll, Chapter Six.

In consequence, we submit the Court need not pursue appellees through their derivative contentions restricted to later periods. The issue was squarely presented at the outset of the trial and *the parties stipulated to a continuance to permit appellees to secure genuine and adequate proof on the issues of priority (TR 71-72) but appellees elected to rest upon secondary and substitute evidence of the weakest possible kind and, necessarily, the Court must assume and presume that further proof of higher quality would have been adverse to appellees by their suppression of it.*

Still further, the so-called prima facie showing appellees claim is available only as to August 9, 1949, and subsequently, when, it is conceded, that appellant had appropriated and was using VOODOO and, therefore, had not

“commenced to use it after the registration issued”

(15 USCA 280, quoted page 6 appellees' memorandum).

It is of the utmost significance that the trial Court did not indicate adoption of such fanciful notion of a “prima facie case”, as appellees now advance, and that appellees did not seek to reflect any such theory in the findings they submitted to that Court. These contentions are, therefore, as late as they are lame.

5. **The contention appellees are "entitled to their filing dates as first dates of use" (p. 17).**

If sustainable, this argument is beside the point. Appellant proved appropriation of VOODOO and use from 1934, whereas, appellees, at best, can only claim September 10, 1938, and have shown use only from 1949 onward.

6. **The discussion of the "burden of proof" (pp. 18-20).**

This argument proceeds upon the unorthodox assumption that a plaintiff does not have to prove his case. The novelty of the suggestion relieves the Court of the obligation of exploration.

The cases cited by appellees to this point (pp. 18-19) do not hold that the defendant has the burden of proof on any issue in a trade-mark case, any more than any other.

See:

52 *Am. Jur.* 139, para. 167, Trade-Marks.

We have consulted the authorities cited to the point—but have found none that would sustain appellees' contention. Appellant did not allege the special defenses on which it would have had the burden of proof.

The trial Court did not reject appellant's evidence and *did not make any finding that appellant's predecessor had not appropriated VOODOO in 1934 as appellant's evidence clearly demonstrates.*

Appellees cannot, of course, argue that their registrations have become incontestable.

Without regard to any question of technical "burden of proof," it is clear appellant established appropriation in 1934 and use thereafter by its predecessor and itself by every species of proof conceivable in the circumstances.

7. The asserted "background" of appellant (pp. 20-23).

The entire travail here relates to third persons as asserted to have been related to appellant's predecessor, and to dates anteceding the existence of appellant by at least three years and the institution of the instant action by at least eight years!

Temporarily omitting consideration of the principles outlined in the opening brief: (1) that a successor is not perpetually shackled with the conduct of a predecessor, whatever it may have been, (2) that laches and limitations ultimately terminate contention over, even good, claims and (3) that evidence must relate to the issues and the parties before the Court and not to third persons and unrelated transactions—still appellees' discourse at this place does not hang together.

First, the meeting of Mr. Rolley with the District Attorney in 1943 is greatly overstated and overplayed. It was a conference with regard to some new amendments to the California statutes relating to comparisons in advertising of products of different manufacturers (TR 195); no charges were filed, much less tried and sustained. There arises, therefore, a presumption in law that official duty had been properly

performed, hence, that Mr. Rolley had not violated any law or statute of California or of the United States.

Further, there is a similar presumption, applicable everywhere, that a private person takes due care as to his private concerns, hence, that the twenty-nine odd perfumers appellees now cry for did not consider any conduct of Mr. Rolley, appellant's predecessor, at fault with regard to any of the matters appellees here recite.

Certainly, the many reputable firms appellees delight in naming are as competent, well advised and as jealous of their products' reputations as appellees could be and we must assume that, had they been injured, they would have known how to seek redress. Appellees do not have a monopoly in trade-mark litigation, though it is apparent they are more than ordinarily litigious.

Finally, there is the presumption, ever present, that wrong has not been done or intended, and the contrary was not shown here.

Moreover, we know of no decent basis for taking Mr. Rolley to task because, as appellees claim, Coty had registered a French surname which, pronounced with the French habit of dropping the final consonant, so resembled the name with which Mr. Rolley was born and christened that he was denied the right to register his own name as the manufacturer of perfumes. Patently, the result would not have been sustained, had the matter been litigated in any Court of general jurisdiction.

Appellees then quote from the case of

Penn Co. v. M. L. B. & T. Co., 72 Fed. 422, without analysis or page reference to the effect that, in attempting to prove commission of a crime, the existence of common pattern, design, scheme, etc., may be shown for the limited purpose of showing knowledge and intent!

But here there is no crime, no fraud, no evil intent—Mr. Rolley, and later his assignee, engaged in the open, notorious and legitimate manufacture and sale of perfumery products under a name discovered and suggested by Mrs. Rolley, at least four years before the name had occurred to any other perfumer, much less appellees, and certainly not used or registered by anyone, anywhere! This name they continued to use in an open and proper manner for not less than 17 years and appellant was, in fact, the person who challenged appellees' unlawful infringement upon the first use by anyone other than Mr. Rolley and appellant of the name VOODOO.

It is quite true, as appellees repeatedly state, that Mr. Rolley—unlike appellees—did not have a staff of patent and trade-mark specialists employed and did not, therefore, make any litigation search for VOODOO before appropriating the name as a trade-mark, but he did, however, make a careful search of the market to determine that no product was being sold under that name. *But the important consideration, which completely escapes appellees, is that such a search in 1934, and at all times thereafter and until the latter part of 1938, would have proved fruitless,*

because there was then no registration and no one else had appropriated the name to any perfumery product!

The trial Court was misled by all this diffusion and concluded—not that Mr. Rolley and appellant had not appropriated and used the name before any one else—but that “he had violated the law” with regard to the third persons called to the aid of appellees and that, for that reason only, appellant should be denied relief on the cross-complaint.

8. The “analysis” of appellant’s evidence (pp. 23-30).

Examination discloses that appellees have not discovered any references to the record not adverted to in the statement of the case in appellant’s opening brief and here but “argue” the evidence. Since the trial Court did not reject appellant’s evidence and did not find to the contrary, we do not discern any service to the Court in setting forth a seriatim refutation of the unsupported conclusions appellees seek to draw from such evidence. That discussion should have been addressed to the trial Court and appellees’ convictions upon the evidence, if they have any, reflected in the finding they presented to the trial Court.

We note only the gratuity (page 30) that appellant “would ride on” appellees’ advertising—when the proof is demonstrative that *there was no such advertising* of VOODOO for the first fifteen years, and more, of Mr. Rolley’s and appellant’s sale of its products under the VOODOO name and label!

9. The further discussion of registration (pp. 31-32).

The argument here made is not readily comprehended. Apparently, appellees contend that appellant had the burden of proving, not only that the appropriation and use it claims preceded that of appellees by four or more years, but that, in addition, appellant should prove that no one in the world, from the beginning of time, ever used VOODOO in relation to a perfumery product. This extravagance collapses of its own lack of substance. Appellant had only to prove that it had ownership by appropriation and use prior to that of appellees' earliest predecessor, which it did demonstrate. The relative rights of appellant and some unknown and unidentified third person can be established in the event such third person infringes appellant's trade-mark. It is of no concern to appellees.

Appellant's only obligation in this case is to meet the claims of appellees, as the plaintiffs in the case, by showing that the appropriation and use it claims is prior to that asserted by appellees.

10. The discussion of the cases (pp. 34-37).

As we have presented our analysis of the cases appellant specially relies upon in the opening brief, we do not repeat our discussion here. Apparently, appellees do not, as well they cannot, dispute the basic principles declared in the cited decisions.

Appellees appear to suggest (page 35, et seq.) that appellant is bound by the presumptive investigation and inquiry of the registering agencies. This illusion

is adequately dispelled by the pragmatic example before the Court, e. g., a "registration" was accomplished in California *after* the dispute between the instant parties had not only developed, but had, in fact, been recorded in a series of communications, when, as no party to this record will contest, appellant had already used the trade-mark VOODOO throughout the state and elsewhere for 15 or more years.

Absent the sale and advertising of products under the name VOODOO in the west, only the subscribers of the official publications of the United States Patent Office could be expected to learn of appellees' various applications. While presumptive notice is essential to many governmental functions, it is a naive credulity which assumes that every citizen, or every merchant, in the United States has an actual knowledge of the myriad entries in the official register.

Not much can be predicated on this kind of "notice" in any case and only as to matters later than such notice, but here, where a common law right is recognized upon the original appropriation and continued use for years prior to such applications—there is neither occasion for detailed study of such publications nor any disability by reason of its omission.

In all events, registration, like other forms of constructive notice, is prospective, rather than retroactive in effect and, constitutionally, must be so.

See

The Trade Mark Cases, 100 U.S. 82.

11. **The cases originally cited by appellees (pp. 37-38).**

We have examined these cases and find that none of them has any bearing upon the questions here presented. It may be said for appellees that, in this instance, they do not actually claim the cases cited by them support the judgment. Each of them patently involved deliberate adoption of an established and well known trade-mark by one not pretending to any prior appropriation or use—much less the first appropriation, continued use for at least four years before any purported registration, and an over-all use continuously for so much as seventeen years.

Comparison of appellant's established rights with the come lately piracy of legitimate trade-marks involved in these cases is so far from the course that appellees themselves do not attempt it.

12. **The claim the "public" associates VOODOO with appellees (pp. 38-41).**

At this point appellees leave the record for good. There was not one retailer, nor one consumer, nor one advertiser, nor one expert called to support this argument. If, in fact, there could be any association of VOODOO with appellees—it could not have been so for so much as one year, actually only the Christmas season of 1949, whereas appellant's sales had continued for fifteen years and its products were widely known in the areas wherein it had developed distribution. Appellees' statement of their contention concedes this by omission of all reference to times and places and their proof is lacking in supplying any foundation for such an argument.

By contrast, appellant produced its actual purchasing customers, purchasing VOODOO products from its predecessor for a decade!

Who is to say what the public thinks, without some semblance of proof? If appellees were right, it would have been an easy matter to have produced at least one member of the purchasing public to support this claim.

13. The adjudication argument (p. 42).

It is here remarked that appellees have litigated their claims to TABU and VOODOO as against third persons. All that proves is that appellees are aggressive, perhaps unusually so. As the record does not show the facts of these cases, we cannot adequately discuss them. Appellees seem content to say only that they sued third persons and were successful. We see no occasion for this Court to notice these matters, whatever their facts, since they do not relate to priority of appropriation and use as between appellant and appellees and that is the only point to be decided herein.

14. The dismissal of the cross-complaint (pp. 42-44).

The reversal herein will reinstate the cross-complaint and, for that reason, there is little need to comment on the error in dismissing the cross-complaint, for the exclusive reason that appellant's predecessor had "violated the law" with respect to third persons and at times prior to 1943. It may be noted, however, that it was error to dismiss after issue

joined and plenary proof and, in any event, there should have been responsive findings and a judgment on the issues—even if appellant could not prevail.

15. The preliminary injunction (pp. 44-46).

This order, from which no appeal was prosecuted, has been final for nearly a year and we see no occasion to resurrect it. It may well be that the order was sustainable as a preliminary order based upon the balancing of the equities of presumably innocent third persons unwittingly participating with appellees in the latter's infringement of appellant's trademark VOODOO. But a final judgment is another matter. Appellant has not argued this item at length, and does not do so now, for the reason that this provision of the decree will fall with the reversal of the principal holding as an incident thereof.

16. The claim appellant had a fair trial (pp. 46-47).

Appellees provide no references to the record or to controlling authority not adverted to in the opening brief. It is tacitly conceded that it was error to try the cases of third persons with respect to unsupported contentions of wrongdoing by appellant's predecessor in interest, and no effort is made at rehabilitation of the rulings during trial. Nor is it denied that the trial Court did, in fact, determine the case upon the misconception that the Court was somehow precluded from ruling as the conscience of the chancellor dictated, by reason of such asserted wrongdoing of another in the long ago.

The point is, the trial Court was misled into error by appellees' overreaching and abused its discretion in not granting a new trial to correct the miscarriage. How can any auditor disabuse his mind of some 29 separately asserted "infringement" suits intruded upon him. It would be different had appellant acquiesced in this travesty, but it did not do so and objected repeatedly. Appellees cannot complain if their conscious and intransigent overreaching has fatally fouled their advantage so unfairly acquired. The chancellor should have obeyed his conscience, and this Court must reverse with the remand that he do so.

CONCLUSION.

It is respectfully submitted that the decree and writ should be reversed for each of the reasons set forth in appellant's opening brief.

Dated, San Francisco, California,
December 12, 1952.

HARRY GOTTESFELD,
JOSEPH A. BROWN,
HUTCHINSON & QUATTRIN,
By J. ALBERT HUTCHINSON,
Attorneys for Appellant.



No. 13390

**United States
Court of Appeals**
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
R. D. MERRILL,
Appellee.

Transcript of Record

**Appeal from the United States District Court
Western District of Washington,
Northern Division.**

OCT 24 1952

PAUL F. O'BRIEN
CLERK



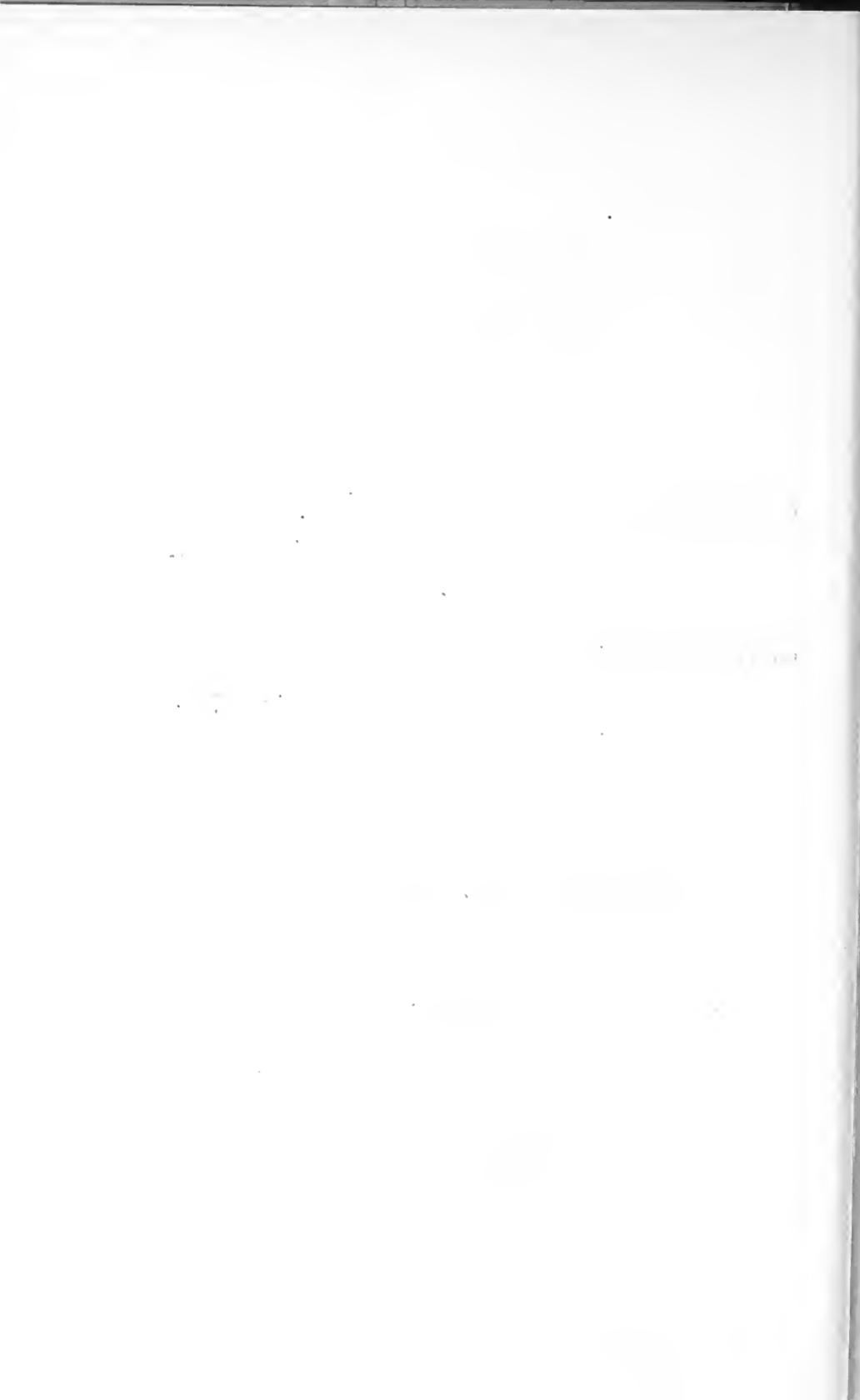
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Seattle 1, Washington.

1870

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THE STATE OF NEW YORK

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In the United States District Court for the Western
District of Washington, Northern Division.

File No. 2418

R. D. MERRILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

FIRST CAUSE OF ACTION

1. The jurisdiction of this Court herein arises under Title 28, United States Code, Section 1346 (a) (1), in that it is a civil action against the United States to recover excessive sums totalling less than \$10,000 illegally assessed and collected under the internal revenue laws of the United States.

2. At all times herein referred to, plaintiff was, and he now is, a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

3. During the year 1940, plaintiff duly filed with the Collector of Internal Revenue of the United States for the District of Washington and Alaska, his income tax return for the year 1939 and paid on account of the tax liability thereon to the said Collector the sum of \$2,839.07 during the said year.

4. Thereafter upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on May 27, 1942, plaintiff on August 27, 1942, paid to the said Collector of Internal Revenue

an additional amount of \$3,716.42 asserted by the said Agent to be due.

5. Thereafter on May 25, 1943, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of \$4,361.88 plus interest on account of erroneous overstatement of the plaintiff's net income for the year 1939 in the amounts and for the reasons set forth in the said claim. Included in the said claim is the item herein sued for.

6. Prior to December 3, 1947, the other items covered in the said claim of refund were allowed by the Commissioner of Internal Revenue, but on the said date by registered mail, notice of the disallowance of the item herein sued for was sent to plaintiff by the Commissioner of Internal Revenue.

7. Said disallowance of the said portion of plaintiff's claim for refund was erroneous, and said plaintiff has paid excessive and illegal income taxes for the year 1939 for the reason, and upon the ground, as asserted in the said claim for refund, that there was erroneously included as income received by the plaintiff in his return for the said year, an amount of \$2,500.00 advanced to him during the said year by the Estate of Eula Lee Merrill, deceased, of which estate plaintiff was executor.

8. In the course of the administration of the Estate of the said Eula Lee Merrill, the deceased wife of the plaintiff, plaintiff was on November 22, 1939, by an order of the Court of his appointment, authorized to pay to himself for his services as executor, the sum of \$20,000 which was to be paid as follows:

On December 23, 1939, the sum of \$12,500 and the balance on December 10, 1940.

9. In the tax return for 1939 aforesaid, plaintiff erroneously reported the full sum of \$12,500 as income received by him as executor whereas, in truth and in good conscience, only \$10,000 thereof was actually income to him and the other \$2,500 was actually only an advance to him, subsequently repaid. The erroneous advance was occasioned by the fact that, under the laws of the State of Washington the entire community property is administered by the executor upon the death of one spouse, not merely the half over which the deceased spouse had the power of testamentary disposition. The estate of Eula Lee Merrill was entirely community. In effect, under the law of the State of Washington, the estate of the deceased spouse pays (and is charged with) only one-half of the administrative expenses, including executor's fees, the other half is chargeable against the share of the surviving spouse and where, as here, the surviving spouse is the executor, no income accrues to the executor by the transfer to himself of his own funds.

10. By reason of the erroneous inclusion of the said sum of \$2,500 in the net income of plaintiff as aforesaid, plaintiff has paid an excessive tax for the said year in the sum of \$525.00, and plaintiff is entitled to judgment on this cause of action in the full sum of \$525.00 together with interest.

Second Cause of Action

1. Plaintiff adopts the allegations of paragraphs

1 and 2 of his First Cause of Action to the same extent as if herein repeated at length.

2. During the year 1941, plaintiff duly filed with the Collector of Internal Revenue of the United States for the District of Washington and Alaska, his income tax return for the year 1940 and paid on account of the tax liability thereon to the said Collector all amounts due according to the computations set forth in the said return.

3. Thereafter upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on September 16, 1946, plaintiff on January 23, 1947, paid to the said Collector of Internal Revenue an additional amount of \$7,585.38 asserted by the said Agent to be due.

4. Thereafter on January 21, 1949, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of \$3,927.02 plus interest on account of erroneous overstatement of the plaintiff's net income for the year 1940 in the amount of \$7,500 and for the reasons set forth in the said claim.

5. The ground for asserting that the inclusion of the said \$7,500 in the net income of plaintiff for the year 1940 was erroneous, as asserted in said claim for refund, is that the said \$7,500, which was set up in the said Report of the Revenue Agent as income received by plaintiff as executor of the Estate of Eula Lee Merrill, his deceased wife, on December 10, 1940 of said year, was never actually income received from the

estate of his wife, but was an advance, subsequently repaid, as is more fully explained in paragraphs 8 and 9 of the First Cause of Action hereinabove set forth, which are hereby incorporated by reference herein to the same extent as if repeated at length.

6. More than six months have elapsed since the filing of said claim for refund and no part of the same has been paid.

7. There is justly due and owing to plaintiff on account of this Second Cause of Action the full sum of \$3,927.02 plus interest.

Wherefore, plaintiff demands judgment against the defendant, as follows:

(1) Upon the first cause of action in the sum of \$525.00 plus interest.

(2) Upon the second cause of action in the sum of \$3,927.02, plus interest.

(3) For his costs.

/s/ RAYMOND G. WRIGHT,

/s/ ARTHUR E. SIMON,

Wright, Innis, Simon & Todd,
Attorneys for Plaintiff.

State of Washington
County of King—ss.

R. D. Merrill, being first duly sworn, on his oath deposes and says:

I am the plaintiff named in the foregoing com-

plaint; I have read the same, know the contents thereof, and believe the same to be true.

/s/ R. D. MERRILL.

Subscribed and sworn to before me this 17th day of November, 1949.

[Seal] /s/ NELSON T. BRUCE,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant, by J. Charles Dennis, United States Attorney for the Western District of Washington, Northern Division, generally denies all the allegations of the complaint, except such designated allegations as it expressly admits.

The defendant further answers as follows, the numbers of the following paragraphs corresponding respectively, to the numbers of the paragraphs of the complaint.

Answer to First Cause of Action

1. The defendant admits these allegations, except it denies the allegation or implication that the sums which the plaintiff seeks to recover were illegally assessed and collected or exceeded the amount of taxes legally assessed and collected.

2. The defendant admits these allegations.
3. The defendant admits these allegations.
4. The defendant admits these allegations, except it denies that the taxes were paid on August 27, 1942. The defendant says that the taxes were paid on August 25, 1942.
5. The defendant denies these allegations, except it admits that on May 25, 1943, the plaintiff duly and regularly filed a claim for refund, in the amount of \$4,361.88, which speaks for itself with respect to its contents.
6. The defendant admits these allegations, subject to a computation determining the correctness of the amount of the item sued for.
7. The defendant denies these allegations, except it admits that the plaintiff was executor of the estate of Eula Lee Merrill, deceased.
8. The defendant admits these allegations, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff's fee "was to be paid" in two installments as alleged.

The defendant says that the fee was, in fact, paid and received in two installments and on the dates as alleged.
9. The defendant admits that the entire estate of Eula Lee Merrill consisted of community property, and that under the laws of the State of Washington

the entire community property is administered by the executor upon the death of one spouse.

The defendant denies the remaining allegations.

10. The defendant denies these allegations.

Answer to Second Cause of Action

1. The defendant adopts the allegations of paragraphs 1 and 2 of its answer to the plaintiff's first cause of action, *supra*, to the same extent as if herein repeated at length.

2. The defendant admits these allegations, except it denies the allegation or implication that the plaintiff paid, during 1941, his entire tax liability.

3. The defendant admits these allegations, except it denies that the taxes were paid on January 23, 1947. The defendant says the taxes were paid on January 24, 1947.

4. The defendant admits these allegations, except it denies the allegations of the claim for refund and that the plaintiff's net income was overstated in his return. The defendant says that the plaintiff's net income was understated in his return. The defendant further says that the claim for refund speaks for itself with respect to its contents.

5. The defendant denies these allegations, except the allegations of paragraphs 8 and 9 of the plaintiff's first cause of action, its answers to which, *supra*, are hereby incorporated herein by reference to the same extent as if repeated at length. The de-

defendant says that the claim for refund speaks for itself with respect to its contents.

6. The defendant admits these allegations.

Wherefore, the defendant prays that judgment be entered for the defendant, with costs.

/s/ J. CHARLES DENNIS,
United States Attorney,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 19, 1950.

[Title of District Court and Cause.]

STIPULATION CONCERNING FACTS

It is hereby stipulated by and between the plaintiff in the above cause through his attorneys, Wright, Innis, Simon & Todd, and the defendant above named through and by J. Charles Dennis, United States Attorney for the said District and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, its attorneys, that the following matters are deemed admitted as to the issues framed by the complaint herein and by the answer thereto, without the necessity for the introduction of any evidence with reference thereto, upon the trial of the said cause:

1. That the jurisdiction of this Court herein arises under Title 28, United States Code, Section

1346 (a) (1) and Title 28, United States Code, Section 1402 (a).

2. That at all times herein referred to, plaintiff was and he now is a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

3. That the plaintiff's wife, Eula Lee Merrill, died a resident of Seattle, Washington, on April 9, 1938, leaving a last will and testament which on April 21, 1938, was admitted to probate in the Superior Court of the State of Washington for King County. A true and correct copy of the certificate of qualification of the plaintiff as executor is hereto attached, marked Exhibit "A" and by reference made a part hereof.

4. That the said plaintiff and Eula Lee Merrill, prior to the death of the latter on April 9, 1938, lived in Seattle, Washington, and the estate consisted solely of community property belonging to the community composed of said Eula Lee Merrill and the plaintiff.

5. That on October 24, 1939, the plaintiff as executor filed his final report and petition for distribution, and on November 22, 1939, the Superior Court of the State of Washington for King County, in the Matter of the Estate of Eula Lee Merrill, deceased, entered a decree of distribution, which decree, among other things, provided "that the executor is hereby authorized and empowered to pay to himself for his services as executor in the probate of the

above estate the sum of \$20,000.00 * * *"; that pursuant to the decree of distribution, the plaintiff as executor complied with the terms thereof, and distribution was made in accordance therewith. A true and correct copy of the decree of distribution of said date is hereto attached, marked Exhibit "B" and by reference made a part hereof.

6. That on December 23, 1939, and December 10, 1940, the plaintiff paid to himself as executor the sums of \$12,500.00 and \$7,500.00, respectively, both payments being made out of the decedent's one-half interest in the community property, the plaintiff having upon being qualified as executor on April 21, 1938, separated the said community property and only one-half thereof was taken over and reflected in the executor's books of account. That on December 30, 1939, the estate of Eula Lee Merrill had on deposit in the First National Bank of Seattle, Washington, the sum of \$12,281.76 after payment of the \$12,500.00 to R. D. Merrill by check dated December 23, 1939.

7. That on May 27, 1940, the plaintiff timely filed with the Collector of Internal Revenue of the United States for the District of Washington and the Territory of Alaska his income tax return for the year 1939 and paid on account of the tax liability thereon to the said Collector of Internal Revenue the sum of \$2,839.07 during said year. Plaintiff included in said return the sum of \$12,500.00 received by him during said year as executor's fees from the estate of Eula Lee Merrill, Seattle, Wash-

ington. A true and correct copy of said return is hereto attached, marked Exhibit "C" and by reference made a part hereof.

8. That in connection with an examination of the aforesaid income tax return of said plaintiff for the year 1939, and in accordance with the Revenue Agent's report issued in connection therewith, and as a result of adjustments not herein involved, a deficiency in tax of \$3,716.42, together with interest assessed of \$544.99, was paid by the said plaintiff to the Collector of Internal Revenue for the District of Washington as follows: August 25, 1942, \$3,716.42; September 15, 1942, \$544.99.

9. That thereafter on May 25, 1943, plaintiff timely filed with the said Collector of Internal Revenue a claim for refund in the sum of \$4,361.88 based upon three issues, only the issue stated in paragraph (2) thereof being involved in this action. A true and correct copy of said claim for refund is hereto attached marked Exhibit "D" and by reference made a part hereof.

10. That prior thereto and on July 8, 1939, the said plaintiff, as executor of the last will and testament of Eula Lee Merrill, had timely filed an estate tax return with the said Collector of Internal Revenue. A true and correct copy thereof is hereto attached, marked Exhibit "E" and by reference made a part hereof.

11. That in said estate tax return, plaintiff, as executor, claimed a deduction of \$20,000.00 on ac-

count of estimated executor's fees, but thereafter and during the examination of said estate tax return in December 1940, the Internal Revenue Agent conducting the investigation called attention of the plaintiff to the fact that for Federal estate tax purposes, only one-half of the executor's fee could be claimed as a deduction in the estate tax return by reason of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Lang's Estate vs. Commissioner of Internal Revenue, 97 F. (2d) 867. The plaintiff, as executor, accordingly acquiesced in the position of said Agent as aforesaid, and on or about January 4, 1941, paid the balance of Federal estate tax in full as recommended by said Agent with a deduction on account of executor's fees of only \$10,000.00.

12. That after the conference with the Agent of the Bureau of Internal Revenue regarding the estate tax return as aforesaid, and on December 31, 1940, the plaintiff, on his individual books of account, credited the estate with the sum of \$10,000.00, and a corresponding entry was made on the books of account of the estate. The journal entry on the plaintiff's books of account is as follows:

| Dec. 31, 1940 | Debit | Credit |
|--------------------------------------|------------|-------------|
| R. D. Merrill—withdrawals | \$7,500.00 | |
| Salaries and fees | 7,500.00 | |
| Estate of Eula Lee Merrill | | \$15,000.00 |

To charge salaries and fees with amount of executor's fees paid R.D.M. in 1940 (\$7,500) and charge withdrawals with \$2,500 executor fee paid R.D.M.

in year 1939 (and reported as income) which represent one-half of total executor fee of \$20,000 claimed on Estate Federal Tax return, only one-half of same allowable. Also to charge withdrawals with unallowed one-half of attorney fees of \$10,000, \$5,000 allowed.

The journal entry on the books of account of the estate is as follows:

| Dec. 31, 1940 | Debit | Credit |
|---------------------------------|-------------|-------------|
| R. D. Merrill..... | \$15,000.00 | |
| Executor and attorney fees..... | | \$12,500.00 |
| Estate corpus | | 2,500.00 |

To charge R. D. Merrill with one-half of executor and attorney fees not allowed on final return, per audit.

That after giving effect to the foregoing, the books of account of the plaintiff and of the estate reflected that on December 31, 1940, the plaintiff was indebted to the estate in the sum of \$20,190.97, which account was finally balanced by cash payment by plaintiff to the trust referred to in paragraph 13 (K) of Exhibit "B", attached hereto, in the amount of \$11,174.86 on August 14, 1943.

13. That on September 15, 1941, plaintiff timely filed with the Collector of Internal Revenue for the District of Washington, his income tax return for the year 1940, and paid the tax liability shown to be due thereon. A true and correct copy of said return is hereto attached, marked Exhibit "F" and by reference made a part hereof.

14. That thereafter, Internal Revenue Agent E. E. Harney, by report dated September 16, 1946 (re-submitted December 2, 1946), recommended a deficiency of \$9,300.08, based in part upon the failure of the plaintiff to include in gross income the said \$7,500.00 as executor's fees received by plaintiff during the taxable year. The plaintiff paid said deficiency, together with interest assessed of \$3,226.87, to the said Collector of Internal Revenue as follows: June 11, 1941, \$3,668.65; January 24, 1947, \$7,585.38, and July 2, 1947 (by credit), \$1,272.92. A true and correct copy of said Agent's report is hereto attached marked Exhibit "G" and by reference made a part hereof.

15. That prior to December 3, 1947, the other items covered in the claim for refund for the year 1939, Exhibit "D" attached hereto, referred to in paragraph 9 hereof, were allowed by the Commissioner of Internal Revenue, but on the said date, by registered mail, notice of the disallowance of the item which is the subject of the First Cause of Action set forth in the complaint of the plaintiff herein was sent to the plaintiff by the Commissioner of Internal Revenue. A true and correct copy of the said notice of disallowance is hereto attached, marked Exhibit "H" and made a part hereof.

16. That thereafter, on January 21, 1949, plaintiff timely filed with the said Collector a claim for refund in the sum of \$3,927.02, plus interest, on account of alleged erroneous overstatement of plaintiff's net income for the year 1940 in the amount of

\$7,500.00, upon the grounds and for the reasons set forth in said claim. A true and correct copy of said claim is hereto attached, marked Exhibit "I" and by reference made a part hereof.

17. That more than six (6) months elapsed after the filing of said claim for the year 1940, Exhibit "I", prior to the institution of this action, and that no part of the said claim referred to in the Second Cause of Action set forth in the plaintiff's complaint had been allowed or paid at the time of the filing of the said action nor up to this date.

18. That no part of the demand asserted in plaintiff's First Cause of Action has been paid.

Dated this 15th day of October, 1951.

WRIGHT, INNIS, SIMON &
TODD,

Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,

United States Attorney;

/s/ THOMAS R. WINTER,

Special Assistant to the Chief Counsel, Bureau of
Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed October 16, 1951.

[Title of District Court and Cause.]

NOTICE OF PRESENTATION

To the Defendant Above Named and J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel of the Bureau of Internal Revenue, Its Attorneys:

You Are Hereby Notified that the plaintiff in the above cause will present to Honorable William J. Lindberg, one of the Judges of the above Court, for signature on Monday, February 18, 1952, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard, in the Courtroom of the said Judge in the United States Court House at Seattle, Washington, Findings of Fact, Conclusions of Law and a Judgment, copies whereof are herewith served upon you.

**WRIGHT, INNIS, SIMON &
TODD,**

/s/ **ARTHUR E. SIMON.**

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Be It Remembered, that the above cause came on duly and regularly for trial before Honorable William J. Lindberg, one of the Judges of the above Court, on the 16th day of October, 1951, and the plaintiff appearing in person and by Arthur E. Simon, of Wright, Innis, Simon & Todd, his attorneys, and the defendant being represented by J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel of the Bureau of Internal Revenue, and the parties having introduced their evidence and having rested, and the said parties having submitted written briefs, and the matter having been further argued orally on February 11, 1951, and the Court being in all things fully advised, now makes the following Findings of Fact:

As to the First Cause of Action

1. That the jurisdiction of this Court herein arises under Title 28, United States Code, Section 1346 (a) (1) and Section 1402 (a).

2. That at all times herein referred to, plaintiff was, and he now is, a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

3. That during the year 1940, plaintiff duly filed with the Collector of Internal Revenue of the United

States for the District of Washington and Alaska his income tax return for the year 1939 and paid on account of the tax liability thereon to the said Collector the sum of \$2,839.07 during the said year.

4. That thereafter upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on May 27, 1942, plaintiff on August 25, 1942, paid to the said Collector of Internal Revenue an additional amount of \$3,716.42 asserted by the said Agent to be due.

5. That thereafter on May 25, 1943, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of \$4,361.88, plus interest, on account of erroneous overstatement of the plaintiff's net income for the year 1939 in the amounts and for the reasons set forth in the said claim. A true copy of the said claim for refund was regularly admitted in evidence herein as Exhibit D, and the item for which recovery is herein sought was included in the said claim.

6. That prior to December 3, 1947, the other items covered in the said claim for refund, and not here involved, were allowed by the Commissioner of Internal Revenue but that on the said date, by registered mail, notice of the disallowance of the item herein sued for was sent to the plaintiff by the Commissioner of Internal Revenue. A true and correct copy of the said notice was duly received in evidence herein as Exhibit H.

7. That said disallowance of the said portion of

the plaintiff's claim for refund was erroneous and that said plaintiff had paid excessive and illegal income taxes for the year 1939 for the reason and upon the ground, as asserted in the said claim for refund, that there was erroneously included in his return for the said year as income received by the plaintiff an amount of \$2,500.00 which was advanced to him during the said year by the Estate of Eula Lee Merrill, Deceased, which Estate the plaintiff was engaged in settling during the said year as Executor under the non-intervention will. A certified copy of the certificate of qualification of the plaintiff, as Executor as aforesaid, was duly received in evidence herein as Exhibit A.

8. That in the course of the administration of the Estate of the said Eula Lee Merrill, the deceased wife of the plaintiff, plaintiff was on November 22, 1939, by an order of the Court of his appointment, authorized to pay to himself for his services, as Executor, the sum of \$20,000.00. A certified copy of the said order was duly received in evidence herein as Exhibit B. That the said sum of \$20,000.00 was paid in installments in the sum of \$12,500.00 on December 23, 1939 and the balance of \$7,500.00 on December 10, 1940.

9. That in the income tax return for 1939 aforesaid, plaintiff erroneously reported the full sum of \$12,500.00 as income received by him as Executor whereas, in truth and in fact, only \$10,000.00 thereof was actually income to him and the other \$2,500.00 was actually only an advance to him which he sub-

sequently repaid. That the erroneous advance was occasioned by the fact that, under the laws of the State of Washington the entire community property is administered by the Executor upon the death of one of the spouses, not merely the one-half over which the deceased spouse had the power of testamentary disposition. That the Estate of Eula Lee Merrill was composed entirely of community property. That under the law of the State of Washington, the Estate of the deceased spouse pays (and is charged with) only one-half of the administrative expenses, including executor's fees, the other half is chargeable against the share of the surviving spouse and that where, as here, the surviving spouse is the executor, no income accrues to the executor by the transfer to himself of his own funds.

10. That by reason of the erroneous inclusion of the said sum of \$2,500.00 as income to the plaintiff in his income tax return for the year 1939, as aforesaid, plaintiff paid an excessive tax for the said year in the sum of \$525.00.

As to the Second Cause of Action

1. The Court adopts the allegations of Paragraphs 1 and 2 of the Findings with reference to the First Cause of Action, as hereinabove set forth, to the same extent as if herein repeated at length.

2. That during the year 1941, plaintiff duly filed with the Collector of Internal Revenue of the United States, for the District of Washington and Alaska, his income tax return for the year 1940 and

paid on account of the tax liability thereon to the said Collector all amounts due according to the computations set forth in the said return, a true copy whereof was duly admitted in evidence herein as Exhibit F.

3. That thereafter, upon a Revenue Agent's Report issued in connection with an examination of the aforesaid return on September 16, 1946, which was duly admitted in evidence herein as Exhibit G, plaintiff on January 24, 1947, paid to the said Collector of Internal Revenue an additional amount of \$7,585.38 asserted by the said Agent to be due.

4. That thereafter, on January 21, 1949, plaintiff duly and regularly filed with the said Collector a claim for refund praying return of \$3,927.02, plus interest, on account of erroneous overstatement of the plaintiff's net income for the year 1940 in the amount of \$7,500.00 for the reasons set forth in the said claim. A true and correct copy of the said claim was duly admitted in evidence herein as Exhibit I.

5. That the ground for asserting that the inclusion of the \$7,500.00 in the net income of plaintiff for the year 1940 was erroneous, as asserted in said claim for refund, is that the said \$7,500.00, which was set up in the said Report of the said Revenue Agent as income received by plaintiff as Executor of the Estate of Eula Lee Merrill, his deceased wife, on December 10, 1940 of said year, was never actually income received from the Estate of his wife, but was an advance which he subsequently repaid, as is more fully explained in Paragraphs 8 and 9

of the Findings of Fact with reference to the First Cause of Action hereinabove set forth, which are hereby incorporated by reference herein to the same extent as if repeated at length.

6. That more than six months had elapsed since the filing of the aforesaid claim for refund before the institution of this cause of action and that no part of the amount claimed therein has been paid.

Done in Open Court this 18th day of February, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

From the foregoing Findings of Fact, the Court deduces the following Conclusions of Law:

1. That there is justly due and owing to plaintiff from the defendant upon the First Cause of Action herein set forth the full sum of \$525.00 together with interest thereon at six per cent per annum from August 25, 1942.

2. That there is justly due and owing to plaintiff by defendant on account of the Second Cause of Action herein the full sum of \$3,927.02 together with interest thereon at the rate of six per cent per annum from January 24, 1947.

3. That the plaintiff is entitled to judgment accordingly and for his costs herein to be taxed to the extent permitted under Title 28, United States Code, Section 2412 (b).

Done in Open Court this 18th day of February,
1952.

/s/ WILLIAM J. LINDBERG,
United States District Court.

Presented by:

/s/ ARTHUR E. SIMON, of
WRIGHT, INNIS, SIMON &
TODD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1952.

In the United States District Court for the Western
District of Washington, Northern Division
Civil Action No. 2418

R. D. MERRILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Be It Remembered, that this cause came on duly and regularly for hearing on the 16th day of October, 1951, before Honorable William J. Lindberg, one of the Judges of the above Court, and the plaintiff appearing in person and being represented by

Arthur E. Simon, of Wright, Innis, Simon & Todd, his attorneys, and the defendant being represented by J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel of the Bureau of Internal Revenue, and the parties having introduced their evidence and having submitted written briefs and having presented oral arguments on February 11, 1952, and the Court being in all things fully advised, and having made and signed and caused to be entered written Findings of Fact and Conclusions of Law, now, therefore, in accordance therewith it is by the Court,

Ordered, Adjudged and Decreed :

1. That plaintiff do have and recover of the said defendant upon the First Cause of Action herein the full sum of \$525.00 together with interest thereon at the rate of six per cent per annum from August 25, 1942, until paid.

2. That the plaintiff do have and recover of the said defendant upon the Second Cause of Action herein the full sum of \$3,927.02 together with interest thereon at the rate of six per cent per annum from January 24, 1947, until paid.

3. That the said plaintiff do further recover of the said defendant his costs herein to be taxed to the extent such costs are allowable under Title 28, United States Code, Section 2412 (b).

Done in Open Court this 18th day of February, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ ARTHUR E. SIMON, of
WRIGHT, INNIS, SIMON &
TODD,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1952.

In the District Court of the United States for
the Western District of Washington, Northern
Division

Number 2418

R. D. MERRILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF COURT'S ORAL DECISION

in the above-entitled and numbered cause, in the
United States Court House, at Seattle, Washington,
on the 11th day of February, 1952, at 10:00 o'clock
a.m., by the Honorable William J. Lindberg, United
States District Judge.

Appearances:

ARTHUR E. SIMON, ESQ., of
WRIGHT, INNIS, SIMON & TODD,
Appeared on Behalf of Plaintiff.

THOMAS R. WINTER, ESQ.,

Assistant United States Attorney,

Appeared on Behalf of Defendant.

PROCEEDINGS

(Argument having been made by the respective Counsel, the following proceedings were had, to wit:)

The Court: It is the decision of the Court in this case that the ten thousand dollars (\$10,000.00) involved here in the two (2) causes of action, twenty-five hundred dollars (\$2,500.00) in the first and seventy-five hundred dollars (\$7,500.00) in the second cause of action, were mistakenly reported as income, and, in fact, ten thousand dollars (\$10,000.00)—twenty-five hundred dollars (\$2500.00) in 1939—is that correct?

Mr. Simon: Yes, your Honor.

The Court (Continuing): —and seventy-five hundred dollars (\$7,500.00) in 1940 were, in fact, not income under the laws and decisions of the State of Washington. The ten thousand dollars (\$10,000.00) of the twenty thousand dollars (\$20,000.00) chargeable to the one-half of the community estate that passed by inheritance was income and the remaining ten thousand dollars (\$10,000.00) was chargeable, not to the one-half of the Estate that passed by inheritance but, rather, to the Plaintiff's one-half of the community estate, and that if it were paid to him it was payable not only out of the cor-

pus of the community estate but out of his one-half ($\frac{1}{2}$) and, therefore, would not constitute income.

(Whereupon, there was colloquy between Court and Counsel, and the following proceedings were had, to wit:)

The Court: There should be findings.

Mr. Simon: Yes. I will submit them to Counsel.

(Whereupon, other matters were considered and hearing in the within-entitled and numbered cause was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

[Endorsed]: Filed March 13, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: R. D. Merrill, Plaintiff, and to Wright, Innis, Simon & Todd, his attorneys:

You and each of you will take notice that defendant, United States of America, does hereby appeal to the United States Court of Appeals, for the Ninth Circuit from that certain judgment, findings and conclusions entered in the above-entitled case on the

18th day of February, 1952, and each and every part and the whole thereof.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of
Internal Revenue, Attorneys for Defendant.

[Endorsed]: Filed April 16, 1952.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard *ex parte* this date on motion of the United States of America, through its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, for an order extending time for filing the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal be, and is hereby extended to ninety days from the date of the filing of the first Notice of Appeal, to wit, the 15th day of July, 1952.

Made and entered at Seattle, Washington, this
20th day of May, 1952.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ THOMAS R. WINTER.

[Endorsed]: Filed May 20, 1952.

[Title of District Court and Cause.]

ORDER

The appellant, having designated for inclusion in the record on appeal the complete record and all the proceedings in the action, and good cause appearing therefor, it is hereby

Ordered that the Clerk transmit to the United States Court of Appeals for the Ninth Circuit as a part of the record thereof all exhibits which were received in evidence in the action.

Dated this 9th day of June, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ THOMAS R. WINTER.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1952.

In the District Court of the United States for
the Western District of Washington, Northern
Division

Number 2418

R. D. MERRILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF TESTIMONY OF
JUSTIN M. MARTIN,

had on the 16th day of October, 1951, commencing at
10:00 o'clock, a.m., before the Honorable William J.
Lindberg, United States District Judge, at Seattle,
Washington.

Appearances:

ARTHUR E. SIMON, of
WRIGHT, INNIS AND TODD,

Appeared on Behalf of the Plaintiff.

THOMAS R. WINTER,

Special Assistant to the Attorney General,

Appeared on Behalf of the Defendant.

Whereupon, the following proceedings were had,
to wit: [1*]

***Page numbering appearing at top of page of original Reporter's
Transcript of Record.**

Proceedings

(Colloquy having been had between the Court and Counsel, and exhibits having been offered and received, the following proceedings were had, to wit:)

The Court: You may proceed, Mr. Simon.

Mr. Simon: I should like to call Mr. Justin Martin as a witness, please.

Whereupon,

JUSTIN M. MARTIN

was called as a witness, and, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Simon:

Q. Will you state your name, please?

A. Justin M. Martin.

Q. Do you reside in the City of Seattle?

A. That is right.

Q. How long have you lived here, sir?

A. Since 1931.

Q. What is your vocation?

A. I am a certified public accountant.

Q. How long have you been such, Mr. Martin?

A. Since May, 1936.

Q. And—— [2]

Mr. Winter: We admit his qualifications.

Mr. Simon: All right.

Q. (By Mr. Simon): With what firm, if any, have you been associated during this period?

(Testimony of Justin M. Martin.)

A. I have been employed by the firm of Ernst and Ernst.

Q. And during what period of time have you, on behalf of that firm, been engaged with the accounts and income tax returns of Mr. R. D. Merrill, the Plaintiff in this case?

A. Since December, 1936.

Q. And what, in general, has been the nature of your employment in connection therewith, both as to your firm and as to you individually, with reference to the supervision that you have exercised during that period over his accounts?

A. Well, I work—we have advised him, of course, in connection with income tax matters. We have prepared the income tax returns in his office for himself and for the other entities, and there are a number of them in that office.

In fact, we have given general public accounting service that covered every phase of work [3] that might be required of a public accountant during that period.

Q. Specifically, during the years 1939 and '40 were the accounts of Mr. R. D. Merrill, individually, and of the estate of Beulah Lee Merrill subject to your supervision? A. That is right.

Q. Mr. Martin, in the stipulation concerning facts which has been introduced into evidence herein, and with which you are familiar, there is a reference in paragraph twelve (12) to certain journal entries. You are familiar with those journal entries? A. Yes, I am.

(Testimony of Justin M. Martin.)

Q. Will you tell us, please, what was the occasion for the journal entries referred to in paragraph twelve (12) of the stipulation?

A. During the month of December, 1940, in the course of discussions with the Internal Revenue agents concerning the Federal estate tax return of the Beulah Merrill estate, we became convinced that only one-half ($1/2$) of the administration expenses, including the executor's fee, was payable out of Mrs. Merrill's half of the community estate.

Since the full payment—since the full executor's fee, allowed to Mr. Merrill in the amount [4] of twenty thousand dollars (\$20,000.00) had been paid out of Mrs. Merrill's property, we recommended that he regard ten thousand dollars (\$10,000.00) of this payment as being merely an advance to him and that he be charged for it on the books.

These entries to which you refer we suggested to reflect that transaction.

Upon Mr. Merrill's direction, they were entered on the books as recited in the stipulation.

Mr. Simon: That is all I have of this witness.

Cross-Examination

By Mr. Winter:

Q. Mr. Martin, as I understand it, on December 23, 1939, and after the order of distribution was entered in the Probate Court, paid Mr. Merrill twelve thousand five hundred dollars (\$12,500.00), check clearing December 39, 1939, as executor's fee?

(Testimony of Justin M. Martin.)

A. That is right.

Q. And in preparing his return you showed Mr. Merrill as having an income from that estate of twelve thousand five hundred dollars (\$12,500.00) in 1939?

A. That is right. [5]

Q. On December 10, 1940, the estate, by check, paid Mr. Merrill seven thousand five hundred dollars (\$7,500.00) on the balance of the twenty thousand dollar (\$20,000.00) fee which was allowed to Mr. Merrill as executor's fee for service in administering the estate?

A. That is right.

Q. Now, the estate had substantial income and filed income tax returns for those two (2) years, didn't it?

A. Yes, it did.

Q. Now, after December 10th, as I understand it, an agent was investigating the estate tax return; nothing to do with the income tax but the estate tax return of the estate?

A. That is right.

Q. And you had claimed in the estate tax return, which had been filed before—prior—you had claimed a twenty thousand dollar (\$20,000.00) estimated executor's fee?

A. That is right.

Q. And an estimated twenty thousand dollar (\$20,000.00) executor's fee was allowed by Probate Court and an order was entered?

A. That is right. [6]

Q. When the agent told you you couldn't claim in the estate tax return more than ten thousand dollars you, as I understand it, consented to the position of the Internal Revenue agent and paid the estate tax on that?

A. Right.

(Testimony of Justin M. Martin.)

Q. And then you made these entries on the books after that? A. That is right.

Mr. Winter: That is all.

The Court: Just one question. The agent you referred to as advising this, is that the Internal Revenue agent or the Tax Commission agent?

Mr. Winter: Internal Revenue agent. The copy of his—no, no. A copy of his report is not in there. That was the estate tax revenue agent.

Mr. Simon: I believe it is. I believe his report is in there.

Mr. Winter: No, not the estate tax agent's. It has been stipulated. It was a revenue agent.

Under the Lion decision, your Honor, only one-half ($\frac{1}{2}$) of the cost of administration is includable, or is deductible, for estate tax purposes. [7]

But, we are not concerned here with the estate tax return but with the—

The Court: Income tax.

Mr. Winter: Individual income tax liability.

There is no dispute that the fee of twenty thousand dollars (\$20,000.00) was paid in 1939 and 1940, and then subsequently these entries were made, and that is in the stipulation and this is in explanation of that.

Mr. Simon: Just two (2) questions, Mr. Martin.

Redirect Examination

By Mr. Simon:

Q. The estate of Beulah Lee Merrill, and the income tax returns, to which Mr. Winter referred, at no time claimed—

(Testimony of Justin M. Martin.)

Mr. Winter: Now, if the Court please, we will object to that as calling for a conclusion of the witness and not the best evidence.

The returns themselves will show what they claim, the individual income tax returns.

The Court: I will ask Mr. Simon to finish the question. [8]

Mr. Simon: Yes.

Mr. Winter: Excuse me, your Honor.

Mr. Simon: May I say first that Counsel's cross-examination of this witness is the first reference to income tax returns of the estate. I contemplate asking this witness one question as follows:

Q. (By Mr. Simon): Mr. Martin, in the income tax returns of the estate of Beulah Lee Merrill, concerning which Mr. Martin—or Mr. Winter—inquired of you on your cross-examination, no claimed deduction was made on account of any executor's fee——

Mr. Winter (Interposing): Now, if the Court please——

Q. (By Mr. Simon, continuing): ——paid to Mr. Merrill, was there?

Mr. Winter: Have you finished the question?

Mr. Simon: Yes.

Mr. Winter: We object to it as not the best evidence. The returns themselves will show what deductions were made and this is going into a collateral matter. [9]

(Testimony of Justin M. Martin.)

The witness testified he prepared the returns and I merely inquired whether he prepared all of them, including the income tax returns of the estate. I didn't go into that, merely cross-examination on the question Counsel asked.

Now, if he is going to go into the income tax of the estate, that will take an entire—there is no issue here about it.

Mr. Simon: Well, Counsel asked the question and I am merely trying to avoid a possible inference.

Counsel asked whether, during that period, the estate had income, and I am merely trying to establish by this witness's testimony, concerning which I do not believe there is the slightest controversy, that in those income tax returns for the estate, which were inquired about under the circumstances I have just mentioned for the first time by Counsel, that had nothing to do with the case and I don't want an inference dangling in the air.

I merely propose to show by this witness that those income tax returns of the estate of Beulah Lee Merrill made no reference to any payment of executor's fees to R. D. Merrill and claimed no deduction on account thereof. [10]

Mr. Winter: What difference is that going to make, your Honor.

The Court: I see no damage in answering the question, if the witness knows, Mr. Winter, and he may answer.

Do you recall the question?

The Witness: Yes, I do.

(Testimony of Justin M. Martin.)

A. There was no deduction claimed at any time by the estate for income tax purposes in the income tax returns filed.

Mr. Simon: That is all.

Recross-Examination

By Mr. Winter:

Q. You don't know whether such a deduction could be claimed or not, do you?

Mr. Simon: I object to that as irrelevant and immaterial.

Mr. Winter: He has gone into it, if the Court please. He asked over my objection.

The Court: I think he merely stated a fact, Mr. Winter, in his testimony as he knows it. Now you are asking about a conclusion.

Q. (By Mr. Winter): You took all the possible expense deductions in that return, didn't you? [11]

Mr. Simon: Objected to as not the best evidence.

Q. (By Mr. Winter): Do you remember whether you took all the business expenses——

Mr. Simon: Objected to as not the best evidence.

Mr. Winter: He asked the same thing, if the Court please.

The Court: He may answer, if he knows.

A. The business expenses were claimed as deductions.

Q. (By Mr. Winter): Yes. You are familiar with the Berman Trust Case in the Supreme Court of the United States, aren't you?

(Testimony of Justin M. Martin.)

Mr. Simon: Objected to as——

The Court: Sustained.

Q. (By Mr. Winter): You are a certified public accountant? A. That is right.

Q. And you advise tax payers and you have been advising these tax payers since 1936?

A. That is right.

Q. It was on your advice that they included [12] the twelve thousand five hundred dollars (\$12,500.00) and seven thousand five hundred dollars (\$7,500.00) as income in Mr. Merrill's returns, and they were so filed? A. I beg your pardon.

Mr. Simon: I beg your pardon. I don't believe that is accurate. The seventy-five hundred dollars (\$7500.00) was never included in his return.

Q. (By Mr. Winter): Well, it was paid before you talked to the revenue agent about the Lion case, wasn't it?

Mr. Simon: Yes, and it was charged on the books.

Mr. Winter: I am merely asking the witness. Do you want to testify, Counsel? If you want to, be sworn.

Mr. Simon: No, I am just trying to be——

Mr. Winter: Why don't you make your objection to the Court.

Mr. Simon: I did make an objection to the Court.

The Court: What was the question?

Mr. Winter: I will repeat it.

Q. (By Mr. Winter): It was upon your advice

(Testimony of Justin M. Martin.)

that you included [13] in Mr. Merrill's individual income tax return for the year 1939 the sum of twelve thousand five hundred dollars (\$12,500.00) which was paid to him as executor's fees?

A. That is right.

Q. And it was upon your advice that the seven thousand five hundred dollars (\$7,500.00) was paid to Mr. Merrill under the same circumstances on December 10, 1940?

A. That is right.

Q. Was it your intention to include that seventy-five hundred dollars (\$7500.00) as income to Mr. Merrill before you heard about the Lion case?

A. I can't recall the sequence. You are getting down to such close dates.

Q. Well, you paid the estate—the estate paid the seventy-five hundred dollars (\$7500.00) executor's fees before you talked to the agent, didn't you, in 1940?

A. There were a series of discussions going on with the agent in the latter part of 1940 that covered several months. They were not restricted to a single month.

Q. With the estate tax return?

A. That is right. [14]

Q. You got a copy of the estate tax return?

A. Yes.

Q. I mean, you got a copy of the agent's report?

A. That is right.

Q. And it wasn't until after you had paid the seventy-five hundred dollars (\$7500.00) that you made this revising entry in the books?

(Testimony of Justin M. Martin.)

A. That is right.

Q. And at the time—at the time you made the revising entry, Mr. Merrill owed the estate some twenty thousand dollars (\$20,000.00)?

Mr. Simon: It was stipulated.

Q. (By Mr. Winter): Didn't he?

A. That is right. May I clarify—

Q. And that account was no— He never did pay back to the estate any money, did he?

A. May I clarify that preceding statement? Mr. Merrill owed the estate, after the effect of the reversing entry, some twenty thousand dollars (\$20,000.00).

Q. Yes, and those accounts were not settled with the resulting trust, or the trust established under the will, until about 1943? [15]

A. That is right.

Mr. Winter: We have no further questions.

Mr. Simon: Just two (2) questions for clarification.

Redirect Examination

By Mr. Simon:

Q. Counsel has referred to the income tax returns filed under your advice by Mr. Merrill for the year 1940.

I will ask you whether in that income tax return you included as income the seventy-five hundred dollars (\$7500.00) which was paid on December 10, 1940?

Mr. Winter: Are you through?

(Testimony of Justin M. Martin.)

Mr. Simon: Yes.

Mr. Winter: If the Court please, the return is in evidence and that is the best evidence of what it contains.

Mr. Simon: I think that is right, but he inquired about it.

Mr. Winter: May we have an exception to the Court's admitting testimony relative to the individual returns of the estate which is the best evidence also? [16]

Mr. Simon: Counsel framed a question—

The Court: The Court is at a loss in this matter, not being familiar with the facts as you gentlemen are.

Of course, the facts are the best evidence. It is rather difficult to determine the propriety of the question at this time.

Mr. Simon: Well, I think Mr. Winter will stipulate with me, for the enlightenment of the Court, that the tax return, which is in evidence, indicates that there was no reporting of that seventy-five hundred dollars (\$7500.00) as income in the tax return as filed.

Mr. Winter: I can only stipulate that the return shows—I could say this to the Court, that I can find no reference to seventy-five hundred dollars (\$7500.00), and I haven't examined the return.

I don't think, personally, it was in there, but the return is the best evidence, if the Court please. The return wasn't filed until 1941.

(Testimony of Justin M. Martin.)

The Court: It is the 1940 return of R. D. Merrill?

The Witness: That is right.

The Court: Seventy-five hundred dollars [17] (\$7500.00) was paid on December 10th?

Mr. Simon: That is right.

Mr. Winter: And the return wasn't filed until September 18, 1941. An extension was granted to September 15, 194—

The Court: The question put to the witness was whether or not the payment made to Mr. Merrill on December, 1940, was included in his income tax returns.

Mr. Winter: It was not. It has been stipulated in the record, if the Court please, that upon three (3) issues only one (1) of which is involved herein, the additional tax was asserted of \$9300.08, based in part upon the failure to include the seventy-five hundred dollars (\$7500.00) in the 1943 return.

So that answers counsel's question. I forgot about that stipulation, but still the return is the best evidence of what it shows and that has been agreed.

I call your Honor's attention to paragraph—

The Court: You were talking about twelve (12) at the beginning.

Mr. Simon: This is a little subsequent, [18] I think.

Mr. Winter: This is paragraph—

Mr. Simon: Paragraph fourteen (14).

Mr. Winter: Yes, paragraph fourteen (14).

It is the revenue agent's report showing he recom-

(Testimony of Justin M. Martin.)

mended a deficiency of ninety-three hundred dollars (\$9300.00) based in part upon a failure to include in the gross income of his return the seventy-five hundred dollars (\$7500.00), your Honor.

The Court: Now the question put to the witness was a question as to the payment—to the payment made—the inclusion of the seventy-five hundred dollars (\$7500.00) in the report of the estate rather than——

Mr. Simon: No, your Honor. I was merely trying to clarify what I thought might have been somewhat confusing.

When counsel asked a question of whether in the first instance, a question that I objected to, the twelve thousand five hundred (\$12,500.00) and seventy-five hundred dollars (\$7500.00) were not, under the advice of this man, returned to Mr. Merrill as income during 1939 and 1940 in the income tax [19] returns of that year, and in order to clarify it—I don't think that there was really any dispute about it under the stipulation—I was merely trying to elicit from the witness what was in part already in the stipulation, that, in the first instance the seventy-five hundred dollars which Mr. Merrill got on the 10th of December, 1940, was not reported as income in his return for 1940, and subsequently that the exclusion of that item of income during the year 1940 was upon Mr. Martin's advice.

The Court: With that statement, is that the fact, Mr. Winter?

Mr. Winter: Yes, your Honor. The fact is that

(Testimony of Justin M. Martin.)

in 1939 the return filed in March 15, 1940, presumably, about that time, Mr. Merrill included the twelve thousand five hundred dollars (\$12,500.00) which he received in 1939 as executors fee received by him. On December 10th they paid Mr. Merrill, as executor for his services, seven thousand five hundred dollars (\$7,500.00).

After December 10th, according to the stipulation, the agent came in investigating the estate tax return where they claimed the entire twenty thousand (\$20,000.00) as an estimated executor's fee, and an order of distribution to that effect had [20] been entered and it had been paid. Well, after they had paid it on December 10, 1940, and before the end of the year, they talked with the agent and the agent said for estate tax purposes you can claim only half of that on the estimated tax return for estate tax purposes.

That has nothing to do with Mr. Merrill's returns here.

Then, on December 30th, they made these entries that they consider these payments over and above ten thousand dollars as advance and they made these entries.

That is the testimony.

The return for 1940 was not due until March 15, 1941, or nine (9) months later. At that time, of course, having taken the position that they are taking in this case, the return was filed on the basis that it was not, that only the first ten thousand

(Testimony of Justin M. Martin.)

(\$10,000.00) that was paid was income to Mr. Merrill.

In other words, ten thousand (\$10,000.00) of the first twelve thousand five hundred dollars (\$12,500.00) is the plaintiff's position here, the Government's position is that that is not true, that even if they can't convince the Court, by some [21] reasoning which I can't see, that only half of that ten thousand (10,000) in any event—only half of that first twelve thousand five hundred dollars (\$12,500.00), or \$6,750.00, would be included in the 1939 individual return and then half of the seventy-five hundred dollars (\$7500.00) would be included in Mr. Merrill's return in 1950. We take that position also, but that is an alternative position. If the Court should find entirely for the plaintiff in this case, the Court can not find any more than that amount even on that theory is our position.

But that is an alternative position.

The Court: The Court would like to avoid getting into argument, not being familiar with the facts. I appreciate your statement, Mr. Winter. Are we in position now to continue with this witness, or do you feel the question you asked is essential or not?

Mr. Simon: I would like to have the question answered, though I don't believe there is any dispute about it, merely to avoid having this possible misunderstanding, though I think it has been clarified and I think that I have said before that the answer is implicit in what we have already stipulated and I would like to, in order that I may be sure we [22]

(Testimony of Justin M. Martin.)

understand one another, ask this witness merely to be sure we all understand one another, a leading question to this effect:

Q. (By Mr. Simon): Mr. Simon, the seventy-five hundred dollars (\$7500.00) which Mr. Merrill paid to himself on December 10, 1940, out of the funds of Beulah Lee Merrill's estate for the balance of the executor's fees allowed him was not reported by him in his income tax return for 1940 as income, was it? A. It was not.

Q. And the reason that it was not was because of your advice? A. That is right.

Q. And the basis of your advice was that, as shown by your testimony regarding the journal entries of December 31, 1940, that prior to the end of the month in which the payment was made and received, and prior to the close of the taxable year, Mr. Merrill agreed and had entered upon the books an acknowledgement that this was not received as income but only as an advance; is that right?

A. That is right.

Mr. Winter: If the Court please, we object [23] to the last part of that question. It is certainly leading and calling for a conclusion and trying to attempt to—the conclusion is one that this Court must arrive at.

Mr. Simon: Again——

Mr. Winter: And that is whether or not he paid to himself, and further that it is certainly leading and suggestive and it is testifying for the witness.

The Court: Well, of course, it is leading, but I

(Testimony of Justin M. Martin.)

think in a case of this character it may facilitate the answer and the witness may answer.

A. That is right.

Mr. Simon: That is all.

Recross-Examination

By Mr. Winter:

Q. Well, it wasn't until after you talked to the agent about the estate tax return in any event that you made any correction in the entries in the books?

A. Well, that is true; that is a statement of fact.

Q. Yes. A. That is true. [24]

Q. And when you say, as counsel said to you, when you say that Mr. Merrill paid to himself—Mr. Merrill was the executor of the estate, wasn't he?

A. That is right.

Q. And on the executory of the estate he drew a check as executor payable to himself individually?

A. That is correct.

Q. And deposited it in his own individual account?

A. That is correct.

Q. He had a separate account from the estate?

A. Right.

Mr. Winter: That is all.

Mr. Simon: One further question.

Re-re-redirect Examination

By Mr. Simon:

Q. The funds in that estate account, to which counsel has just referred, were the property of Mrs.

(Testimony of Justin M. Martin.)

Beulah Lee Merrill and represented her half of the community property, do they not?

A. Represented a portion perhaps, but there were other assets in addition which were also part of her half of the community property. [25]

Q. But none of Mr. Merrill's half of the community was in that bank account?

A. That is right.

Further Recross-Examination

By Mr. Winter:

Q. Then if it was all her property paid to Mr. Merrill, it was none of his paid to him in the check; is that right?

A. That is right; that is right.

Q. And then you don't say that he paid to himself then, do you?

A. (Witness laughs.)

Q. Do you?

A. Well, that expression can be—I think it can be interpreted two (2) ways.

Q. You can interpret it two (2) ways?

A. Yes.

Mr. Winter: That is all.

Mr. Simon: I think all we get by that answer is that Mr. Merrill was both the executor and the individual recipient.

The Court: Is that all?

Mr. Simon: I have nothing further with this witness.

(Witness excused.) [26]

Mr. Simon: That is our case, your Honor.

Mr. Winter: We have no testimony, your Honor.

(Whereupon, at 10:50 o'clock, a.m., October 16, 1951, hearing was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a full, true and correct transcript of matters therein set forth, and any omissions in the proceedings had on the date herein set forth have been parenthetically noted.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed June 16, 1952. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-

entitled action, excluding exhibits, and that said papers constitute the record on appeal from that certain judgment, findings and conclusions filed in the above-entitled cause on February 18, 1952, to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Complaint, filed Nov. 18, 1949.
2. Marshal's Return on Summons, filed Nov. 21, 1949.
3. Appearance of Defendant, filed Jan. 18, 1950.
4. Stipulation extending time to answer to 2/15/50, filed 1/21/50.
5. Stipulation extending time to answer to 4/15/50, filed 3/23/50.
6. Answer, filed May 19, 1950.
7. Stipulation for Vacation of Setting, filed Feb. 1, 1951.
8. Stipulation for Vacation of Setting, filed June 6, 1951, and order vacating setting (endorsed thereon).
9. Plaintiff's Trial Memorandum, filed Oct. 16, 1951.
10. Defendant's Contentions, filed Oct. 16, 1951.
11. Stipulation Concerning Facts, filed Oct. 16, 1951.
12. Stipulation re filing memorandum of authorities, filed Dec. 21, 1951.
13. Brief for the United States, filed Jan. 11, 1952.
14. Plaintiff's Reply Brief, filed Feb. 1, 1952.
15. Notice of Presentation, filed Feb. 18, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO SUPPLEMENTAL RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith supplemental to the record on appeal in the above-entitled cause the following additional paper filed in my office subsequent to transmission of the record, to wit:

20. Order Extending time ninety days, to wit: to July 15, 1952, for filing record on appeal, filed May 20, 1952.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 28th day of May, 1952.

[Seal] MILLARD P. THOMAS,
 Clerk.

By /s/ TRUMAN EGGER,
 Chief Deputy.

[Endorsed]: No. 13390. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. R. D. Merrill, Appellee. Transcript of Record and Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Transcript of Record filed May 21, 1952.

Supplemental Transcript of Record filed July 11, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13390

UNITED STATES OF AMERICA,

Appellant,

vs.

R. D. MERRILL,

Appellee.

APPELLANT'S STATEMENT OF THE
POINTS ON WHICH IT INTENDS TO
RELY ON THE APPEAL

The appellant intends to rely on the following points:

1. The trial court erred in ruling that there is justly due and owing to the appellee from the appellant upon the First Cause of Action the sum of \$525 together with interest.
2. The trial court erred in ruling that there is justly due and owing to appellee by appellant on account of the Second Cause of Action the sum of \$3,927.02 together with interest.
3. The trial court erred in ruling that the appellee was entitled to judgment in accordance with the above rulings and to his costs.
4. The trial court erred in filing an order for judgment in accordance with the above rulings.
5. The trial court erred in finding that there was

an over-statement of the appellee's net income for the year 1939 as set forth in his claim for refund.

6. The trial court erred in finding that the disallowance of the appellee's claim for refund was erroneous and that the appellee had paid excessive and illegal income taxes for the year 1939 for the reason that \$2,500 of the amount received by him was an advance from the estate.

7. The trial court erred in finding that the appellee erroneously reported for 1939 the full sum of \$12,500 as income whereas \$2,500 did not constitute income to him as it was merely an advance.

8. The trial court erred in finding that under the law of the State of Washington the estate of a deceased spouse pays and is charged with only one-half of the administrative expenses, including executor's fees, the other half being chargeable against the share of the surviving spouse and that where, as here, the surviving spouse is the executor, no income accrues to the executor by the transfer to himself of his own funds.

9. The trial court erred in finding that the sum of \$2,500 was erroneously included as income to the appellee for 1939 resulting in his paying an excessive tax for that year in the amount of \$525.

10. The trial court erred in finding that there was an erroneous over-statement of the appellee's net income for the year 1940.

11. The trial court erred in finding that the sum

of \$7,500 received by the appellee in 1940 was not income to him but was an advance.

12. The trial court erred in applying to the Second Cause of Action its erroneous finding referred to in point 8, *supra*.

13. The trial court erred in ruling in its oral decision that the \$10,000 here involved was mistakenly reported as income.

14. The trial court erred in ruling in its oral decision that the \$10,000 here involved was not income under the laws and decisions of the State of Washington.

15. The trial court erred in failing to rule that the \$10,000 here involved constituted income to the appellee under the Federal tax laws.

16. The trial court erred in failing to rule that the appellant was entitled to judgment with costs.

17. If the trial court correctly ruled that the appellee was only taxable on \$10,000 of the fee it erred in ruling that all of such amount was received in 1939 and in failing to find that \$6,250 of such amount was received in 1939 and \$3,750 in 1940, and in failing to rule accordingly.

.....
ELLIS N. SLACK,
Acting Asst. Attorney General,
Attorney for Appellant.

Proof of Service attached.
[Endorsed]: Filed June 30, 1952.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE
MATERIAL PORTIONS OF THE RECORD

The appellant hereby designates the entire record
as material to the consideration of the appeal.

/s/ ELLIS N. SLACK,
Acting Asst. Attorney General,
Attorney for Appellant.

Proof of Service attached.

[Endorsed]: Filed June 30, 1952.

**In the
United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

— v. —

R. D. MERRILL,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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FILED

1932

PAUL P. O'BRIEN
CLERK

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
— v. —
R. D. MERRILL, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG, *Judge*

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In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
— v. —
R. D. MERRILL, *Appellee.*

} No. 13390

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTION

We concur in the statements of Appellant's Brief (1, 2) regarding the jurisdiction of the District Court and of this court.

QUESTIONS PRESENTED

We have no quarrel with Appellant's manner of stating the questions here presented (Br. 2, 3).

STATUTES AND TREASURY DECISION INVOLVED

We believe that Appellant has omitted from its Appendix the Treasury Decision which is actually involved in this case. We will supply the omission in the course of our argument.

We believe that in that Appendix, also, counsel have mistakenly set forth a provision of Washington statutory law (Rem. Rev. Stat. §1517) which deals with ordinary executors and is inapplicable to executors under non-intervention wills. The statutes regarding non-intervention wills and the powers and duties of executors thereunder are Rem. Rev. Stat. §§1462, 1463. These we believe to be relevant and they will be found in the Appendix to this brief, *infra*.

STATEMENT

The facts in this case are undisputed. Most of them were covered in a written stipulation. The major issue of law now presented to this court is whether, under those facts, Judge Lindberg was right in holding that only ten thousand dollars of an executor's fee of twice that amount which was allowed to Mr. Merrill, the Appellee, by the Probate Court constituted taxable income to him, or whether he was properly taxed on the full amount.

Upon the death of his wife, her will was admitted to probate and Mr. Merrill's nomination as executor with non-intervention powers was confirmed by the Superior Court of King County, Washington, on April 21, 1938 (R. 12, Ex. A). He immediately qualified.

The parties had long been residents of the State of Washington and the only assets of the estate consisted of the decedent's interest in the community property of her husband and herself (R. 12). The estate was at all times fully solvent (Ex. E).

In proceeding to settle the affairs of his wife's estate,

upon his qualification as the non-intervention executor thereof and pursuant to his authority under Rem. Rev. Stat. §1463, Mr. Merrill immediately divided the community property into two equal parts. One part he handled as his own; the other was taken over and reflected in his books of account as executor (R. 13).

In due course when the estate was in condition to be closed, Mr. Merrill exercised the option accorded non-intervention executors by Rem. Rev. Stat. §1462 and filed a report and petition for distribution. Upon the hearing of that report, the probate court entered a decree of distribution pursuant to this statute (R. 12, Ex. B). In this decree, it was provided that the executor was authorized to pay himself for his services as executor in the probate of the estate, the sum of \$20,000. This decree was entered on November 22, 1939 (R. 12).

In the belief that this executor's fee was payable out of his wife's portion of the community estate, Mr. Merrill paid himself the full amount thereof out of the estate account in which that portion was on deposit. He took payment in two installments. The first, in the sum of \$12,500, on December 23, 1939; and the second, in the sum of \$7,500, on December 10, 1940 (R. 13).

In his individual income tax return for 1939, Mr. Merrill included the \$12,500 received during that year (R. 13).

He did not report the \$7,500 which he received in 1940 in his income tax return for that year (R. 14). The reason for this was that within a few days after

he had taken the second installment of his fee, it happened that he was interviewed by the Internal Revenue Agent who was conducting the investigation of the estate tax return which Mr. Merrill had filed as executor (R. 13, 14). This agent pointed out to Mr. Merrill that under the decision of this court in *Lang's Estate v. Commissioner*, 97 F.(2d) 867, only one-half of the executor's and attorney's fees could properly be paid out of Mrs. Merrill's share of the community property and that only one-half could be properly claimed as a deduction for purposes of computing the Federal estate tax, instead of the full amount thereof as set forth in the return. Mr. Merrill acquiesced in the position of the Agent and paid the Federal estate tax promptly in accordance with that position (R. 15).

Realizing that he had appropriated to himself \$10,000 of trust funds to which he was not entitled as well as having used funds of the trust, without right, to discharge his personal obligation for one-half of the attorney fees, Mr. Merrill consulted Mr. Justin Martin, a certified public accountant of the firm of Ernst & Ernst, who had supervised his individual accounts and those of the estate throughout the period (R. 34, 35). The latter recommended that these excess payments be regarded as being merely an advance and that Mr. Merrill be charged therewith on the books (R. 36). In accordance with this recommendation, forms of entries suggested by Mr. Martin as appropriate to the purpose were actually entered in the books both of Mr. Merrill and of the estate (R. 36). These entries were actually made on December 31, 1940, during the same month in which Mr. Merrill

took the second installment of his executor's fee (R. 15).

In view of this, Mr. Merrill did not report this second installment as income in his income tax return for 1940 (R. 16, 17). By a report dated September 16, 1946, an Internal Revenue Agent recommended a deficiency based in part on this omission (R. 17, Ex. G). Mr. Merrill paid the deficiency (R. 17).

Mr. Merrill filed timely claims for the refund of the portion of his income which was based upon the inclusion of this sum of \$10,000 of executor's fees in the computation of his gross income for the years 1939 and 1940 (R. 14, Ex. D; R. 17, Ex. I). The claims were based upon the grounds hereinafter urged. Admittedly the instant action was timely filed after the rejection of the 1939 claim and the passage of the statutory period of inaction following the filing of the claim for 1940.

SUMMARY OF ARGUMENT

I.

In Washington, each of the spouses has an equal, vested, undivided interest in community property. Upon the death of the wife, the husband's half does not cease to be his and become part of the decedent's estate. His half, like the decedent's, is subject to probate, but, unlike her half, his half never becomes part of her estate.

II.

Where all of the estate of the decedent consists of her interest in community property, only one-half of the community debts and of the general expenses of

administration can properly be paid from her half. Included in such expenses of administration are executor's fees for ordinary services.

III.

Where the surviving husband is the executor, since only one-half of his allowed fee can be paid out of his wife's half of the community property, the other half must come out of property which is already his. To the extent only, therefore, that he is paid out of his wife's half, does he derive taxable income.

ARGUMENT

Agreeing with our analysis of the law as set forth in the foregoing summary, Judge Lindberg granted judgment in favor of Mr. Merrill. We believe the propositions asserted are not subject to well-informed doubt and that the conclusion of the District Court therefrom was palpably right and that the judgment should be affirmed.

I.

In Washington, each of the spouses has an equal, undivided interest in community property. Upon the death of the wife, the husband's half does not cease to be his and become part of the decedent's estate. His half, *whether in real or personal property*, like the decedent's, is subject to probate, but, unlike her half, his half never becomes part of her estate.

Some of the assertions in Appellant's brief regarding the community property law of the State of Washington are astonishing. One such, is the pronouncement, based upon a mistaken *dictum* in the case of *Commissioner v. Larsen*, 131 F. (2d) 85, 87, that upon

the death of one spouse, title to the community personal property vests in the executor (Br. 10). Washington law is well settled to the contrary.

In discussing the community property statute of Washington (now set forth as Rem. Rev. Stat. § 1342), the Supreme Court of the state as early as 1896, pointed out that the statute made no distinction between real and personal property. *In re Fort's Estate*, 14 Wash. 10, 13.

That this is still the law is evidenced by the case of *In re Turner's Estate*, 191 Wash. 145, 148, wherein it is said:

“Ever since *In re Fort's Estate*, 14 Wash. 10, 44 Pac. 104, it has been the law of this state that there is no essential distinction between real and personal property in this state, and that the word ‘inheritance,’ as used in the law of descent, applies as well to personalty as to land; and, under both §1364 and §1366, *supra*, this court has uniformly held that the estate vests immediately in the heir or devisee entitled thereto upon the death of the ancestor, subject only to rights of creditors.”

To the said effect, see,

In re Verchot's Estate, 4 Wn.(2d) 574, 582;
Johnson v. McClure, 5 Wn.(2d) 123, 134.

While the community property statute of Washington (Rem. Rev. Stat. §1342) does contain provisions regarding the descent of community property, the first sentence of the statute is in no sense such a provision. This sentence of the statute has been in effect since 1875. It reads:

“Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts.”

This sentence has been uniformly construed by the Supreme Court of Washington and by the Supreme Court of the United States just as if the expression “shall continue to belong” were substituted for the verb “go.” As construed, the sentence is identical in substance with the provisions of the California statute referred to in footnote 2 on p. 390 of the decision of this court in *Bishop v. Commissioner*, 152 F.(2d) 389.

A striking case supporting this contention is *In re Coffey's Estate*, 195 Wash. 379, 382, wherein the court said:

“The interest of the wife in the community estate in this state is not a contingent or expectant interest, but a present, undivided, one-half interest. *Marston v. Rue, supra; Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634; *Poe v. Seaborn*, 282 U.S. 101, 75 L. Ed. 239, 51 S. Ct. 58. *No new right or interest is generated in the wife by the death of her husband; his death merely affords the occasion for the termination of the husband's interest in the community estate.*” (Italics ours)

We call this a striking case because it raised the question of the extent to which proceeds of life insurance purchased with community funds were taxable under the inheritance tax laws. It decided, of course,

that only one-half of such proceeds were includable in the estate.¹ That was not the striking feature of the case. The amazing feature was that apparently this was the first time anyone had ever contended that more than half of community assets constituted portions of a decedent's estate despite the sweeping provisions of the Washington inheritance tax law (Rem. Rev. Stat. §11201, §11202). It has always been conceded in Washington, that there is no transfer of any additional interest in community property to the surviving spouse upon the death of the other member of the community. (See *In re Heringer's Estate*, 38 Wn. (2d) 399, 405.)

The foregoing authorities could also be cited in support of the proposition that although the surviving spouse's interest in community property in Washington is subject to probate, just as in California since 1927, the surviving spouse's interest never becomes a part of the deceased spouse's estate. This clearly recognized principle is well stated, also, in the case of *Wittwer v. Pemberton*, 188 Wash. 72, 76, as follows:

“While under the law the entire community estate is brought into court to be administered upon, ^{not} only half thereof is inherited, and that half may go to the survivor of the community.”

See, also:

Goulette v. Goulette, 114 Wash. 689, 691;

Redelsheimer v. Zepin, 105 Wash. 199;

¹Cf. *Lang v. Commissioner*, 304 U.S. 264, 82 L. Ed. 1331.

Lang v. Commissioner (C.A. 9) 97 F.(2d) 867, 871.

It is probably true under Washington law that until the community debts are paid and the expenses of administration are discharged, a lien therefor exists against the interest of the survivor as well as against that of the deceased member of the community. Properly considered, the case of *Thatcher v. Capecca*, cited by Appellant (Br. 9), goes no further than this, although it involved intestate succession rather than testamentary disposition by the decedent. To the extent to which such a lien arose by reason of the services of a surviving spouse as executor of his deceased wife's estate, the lien against his own portion of the community property would, of course, be extinguished under the doctrine of merger.

We believe, then, that we have shown that Judge Lindberg was right in concluding that Mr. Merrill's interest in his community property was not diminished upon the death of his wife, under Washington law.

II.

Under Washington law, only one-half of the executor's fee for settling a community estate may be collected from the interest of the decedent in the community property.

Judge Lindberg's decision that under the law of Washington only one-half of the fee allowed to an executor for his ordinary services can be charged to the decedent's interest in the community property under the circumstances here involved, is apparently

not challenged (Br. 13). It is a necessary implication of this court's decision in the *Lang* case.

This brings us to the final major point.

III.

Only to the extent to which a surviving husband's fee as executor is payable or paid out of his deceased wife's share of the property, does he derive taxable income.

When Mr. Merrill acquiesced in the Revenue Agent's contention and acknowledged that he was only entitled to collect half of the fee, which the probate court had allowed him, out of his deceased wife's share of the community property and treated the excess payment as a loan which he subsequently repaid, can it be properly said that Judge Lindberg was wrong in holding that, as to such excess, Mr. Merrill derived no taxable income?

In the District Court, the brief which was prepared by the office of the Attorney General and submitted on behalf of the defendant placed reliance on S.M. 4623, which had also been the basis for the position which Revenue Agent Harney had taken in connection with the deficiency assessment here involved. The same ruling is relied upon in Appellant's Brief, with the observation that it reflects the position maintained by the Commissioner of Internal Revenue since 1925 (Br. 12). The text of the ruling does not appear in Appellant's Brief. In its latest form, it is as follows:

“The law of the State of Washington is that the community is immediately dissolved upon the

death of one of its members and that title to half of the community properly vests absolutely in the surviving spouse upon the death of the other, subject only to the community debts and expense of administration.

“Accordingly, the claim of a widow against an estate for commissions as executrix thereof was superior to her claim as the surviving member of the community, and the entire commission received by her was income subject to tax (S.M. 4623, C.B. Dec. 1925, p. 40).”

1952 Prentice-Hall: Federal Tax Service,
Vol. 2, par. 17072;

51 2 C.C.H., par. 455.203.

With the first paragraph of the foregoing ruling, we have no substantial quarrel. If, however, the ruling was made with reference to an estate which consisted entirely of community property—and counsel for the government so contended below—the concluding portion of the second paragraph squarely states the position with which we take direct issue.

Since this ruling was promulgated in 1925, before there were any authorities in this jurisdiction on the question of whether expenses of administration were chargeable against the entire community estate or solely against the interest of the deceased spouse, the person formulating it may have proceeded upon the assumption that the latter was true. If that were the law, the ruling would have been sound enough. In due time, however, it has been established that expenses of administration in this jurisdiction are not chargeable solely against the interest of the deceased spouse.

Wittwer v. Pemberton (1936) 188 Wash. 72;

Lang's Estate v. Commissioner (1938) 97
F.(2d) 867 (C.A. 9th);

Estate of George V. Heringer (1951) 38 Wn.
(2d) 399.

When an executor is a third person of course this makes no difference as far as his income tax liability is concerned. His entire fee is income to him regardless of the property from which it is paid. When he is the surviving spouse, however, the situation is entirely different. Under these circumstances, he derives income only to the extent to which the fee is payable and paid out of his wife's property. To the extent to which it is paid out of, or chargeable to, his own property, the transaction at most would amount to "removing his own money from one pocket to another." This, we contend, does not constitute income within the taxing power of Congress under the XVIth Amendment.

Counsel asserted below that this ruling had never been criticized by the courts. That may be. We are aware of no decision, on the other hand, which has ever approved it. Certain it is, that it is squarely contradicted by the decision of this court in *Bishop v. Commissioner*, 152 F.(2d) 389. That decision says on this point at p. 390:

"For her services as executrix, petitioner was paid in 1940 a fee of \$1,928.09. The fee was paid from community funds — in other words, from funds one-half of which belonged to petitioner. In her income tax return for 1940, petitioner reported one-half of the fee. The Tax Court held that

the entire fee was income of petitioner and should have been so reported by her. In this the Tax Court erred. One-half of the fee having been paid from petitioner's funds, only the other half constituted income of petitioner."

We submit that the foregoing pronouncement of the law by this court should control the decision in this case and that on this point it cannot be distinguished.

As we have already pointed out, the provisions of Washington law in this respect are substantially identical with the provisions of the California statute which this court had under consideration.

We may be laboring the point unduly but it appears to us that there can be no doubt but that this decision accords with fundamental concepts of what constitutes income. As Judge Learned Hand said in *Schlemmer v. U. S.* (C.A. 2) 94 F.(2d) 77, 78:

"There must be more than difference in the mere form of property to justify a charge of income."

Upon this principle the Supreme Court of the United States has consistently held that an ordinary stock dividend is not income and that the 16th Amendment accordingly gave Congress no power to tax such a dividend. In *Eisner v. Macomber*, 252 U.S. 189, 64 L.ed. 521, the court established this point and from the position there taken, there has been no departure. Of course there was a change in the form of property in the stock dividend cases which is not present here. Here not even the form was changed, so the reasoning of the Supreme Court applies with even greater force. The essential test is expressed by the Supreme Court in this language (252 U.S. 202, 64 L.ed. 527):

“A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased * * *. The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones. *Gibbons v. Mahon*, 136 U.S. 549, 559, 560, 34 L.ed. 525, 527, 528, 10 Sup. Ct. Rep. 1057. *In short, the corporation is no poorer and the stockholder is no richer than they were before. Logan County v. United States*, 169 U.S. 255, 261, 42 L.ed. 737, 739, 18 Sup. Ct. Rep. 361.” (Italics ours)

See, also:

Towne v. Eisner, 245 U.S. 418, 62 L.ed. 372.

Upon this universal principle it is clear that to the extent his allowed fee as executor of his wife's estate was payable or paid out of his own property, Mr. Merrill was no richer after the payment than before. To that extent, accordingly, he derived no income from the payment or allowance of the fee.

Counsel cite a number of cases dealing with the question of who, as between a fiduciary and a beneficiary, is required to account for income, or entitled to claim loss deductions under the Federal income tax law. No such problem is here involved. This case is not concerned with the income of the estate. It has to do solely with the taxability of a single item of income in the individual returns of the recipient. Hence we do not

deem it essential to enter upon a critical examination of these cases nor to discuss the assertion that, for purposes of Federal income taxation, an estate is an accounting unit and may, to that extent, be deemed a separate entity.

As we read those cases, however, it seems that they all agree that the question of who is the owner of the property producing the income is a question of state law. Under Washington law, the marital community is not a separate legal entity, or juristic person, although for convenience the term is frequently used by way of metaphor in so describing it. *Bottle v. Osborne*, 155 Wash. 585, 589. Neither under Washington law, as we have above demonstrated, is the estate of a deceased spouse a separate legal entity to which any portion of the surviving spouse's interest in community property passes upon the death of his mate. In no sense, under Washington law, does the surviving husband's half of the community property cease to be his and become a part of the decedent's estate.

With this general observation we might properly pass the reference in Appellant's Brief to the decision of this court in *Commissioner v. Larson*, 131 F.(2d) 85, were it not for the fact that it contains assertions concerning Washington law and is so heavily relied upon by Appellant. That case was actually concerned solely with the question of who, in the State of Washington, is accountable for income tax on the income of community property during the period of administration when the estate is administered under an ordinary will or as an intestate estate. In that case Adelbert Larson, the husband, died leaving a will

which named a bank as executor. Neither the opinion nor that of the Tax Court (44 B.T.A. 1094), which it reviewed, indicated that the will of the decedent made any provision regarding the disposition of income. The Tax Court held that the income of community property under these circumstances was taxable to the estate and that the surviving wife was not taxable on half of it because she had no right to the income during the taxable year (44 B.T.A. 1102). This court affirmed on the ground that the "ownership" of the income from the community property under the circumstances there before the court was in the executor and that he should report the whole income of the estate (131 F.(2d) 87).

We are confident that we shall be able to demonstrate that the *Larson* case is neither factually nor legally apposite to any problem here involved. For this reason, we believe that this court is not strictly required to pass upon the present authority of that case. Frankly we do not know and the bar of Washington generally is in doubt as to what extent it is still a binding precedent on its facts. It has never been expressly overruled. Yet it was distinguished three years later, in *Bishop v. Commissioner*, 152 F.(2d) 389, 391, wherein this court held that the surviving spouse, under similar circumstances, must report one-half the income of community property.

The asserted ground of distinction is that the laws of Washington involved in the *Larson* case differ respecting rights in community income from those in the *Bishop* case where California law was involved. Nothing explicit in the decisions however reveals any

substantial distinction. Further, when one remembers that the once existing difference discussed in *U. S. v. Robbins*, 269 U.S. 315, 70 L.ed. 285, and *Poe v. Seaborn*, 282 U.S. 101, 75 L.ed. 239, was removed by legislation in California on July 29, 1927 so that *Poe v. Seaborn* became the law in California (*U. S. v. Malcolm*, 282 U.S. 792, 75 L.ed. 714), one is mystified the further by the suggestion that there is now any difference between the essential characteristics of community property in Washington and California.

Neither is any helpful light shed upon the problem by the fact that the case of *Masterson v. Commissioner*, 141 F.(2d) 391, 392 (C.A. 5th) which cited the *Larson* case with approval is not referred to in the *Bishop* case. Nor by the fact that the same court which rendered the *Masterson* decision under Texas law, arrived at a conclusion like that of the *Bishop* case and contrary to its earlier *Masterson* case, in a similar question arising under Louisiana law in *Henderson's Estate v. Commissioner*, 155 F.(2d) 310, without citing any of those cases. Nor is the confusion lessened by the fact that the Court of Appeals for the Fifth Circuit in its latest pronouncement on the subject follows the *Henderson* case and applies the Louisiana rule in Texas, without any reference to its own apparently contrary ruling under Texas law in the *Masterson* case. (*Blackburn's Estate v. Commissioner*, 180 F.(2d) 952.) In such a situation, one cannot but sympathize with the plaint of the Tax Court in *Estate of J. T. Snead, Jr.*, 17 T.C. #160.

Upon one point all of these cases agree. That point is that the question of who is entitled to, and hence

required to report, community income during the period of administration of the estate of a deceased member of the community, is a question of state law. The *Larson* case certainly asserts that this right and obligation rest solely in the personal representative of the deceased husband under the facts of that case and under the law of the State of Washington as applied to those facts. Since the facts of the instant case, as we shall hereinafter point out, make the *Larson* case inapplicable in any event, we might well abandon further discussion of it as purely academic. It does seem to us, however, that it apparently misinterprets Washington cases upon which it relies. We know of no authority in this state which indicates that the husband's vested interest in the community property is divested by his wife's death. We have cited controlling authority to the contrary. Hence, were it material, we would contend that the rule of the *Bishop*, *Henderson* and *Blackburn* cases, rather than that of the earlier *Larson* and *Masterson* cases, is applicable in our jurisdiction.

But, as we have said, we regard the point as academic and not necessary for decision here because the *Larson* case, on its facts, does not apply to the instant situation. As above pointed out, the will in the *Larson* case *did not provide for settlement of the deceased husband's estate without court intervention and it made no bequest of income*. These distinctions are clear, important and decisive.

Both the fact and the importance of the difference are recognized in the Federal and in the state authorities. Speaking of the *Larson* will, the Board of Tax Appeals said:

“This was not the case of ‘a nonintervention will’ in which, upon a showing of solvency, the estate may be administered without court approval. Here each sale and distribution required court sanction and petitioner could only receive the income in question as a distribution from the estate. The facts of the case at bar present petitioner’s view in the strongest possible light. Since the community property was subject to administration and income therefrom was receivable by the estate during administration, we believe it would be contrary to the intendment of section 161(a)(3) of the Revenue Act of 1934 to tax any part of that income to petitioner. In spite of petitioner’s vested interest in the property, she had no right to the income during the taxable year.” (44 B.T.A. 1102)

Under Washington law, settlement of estates without court intervention is essentially different in character from ordinary administration. As the Supreme Court said in *Schubach v. Redelsheimer*, 92 Wash. 124, 127:

“Our statutes provide two ways for probating estates under wills, one method being to probate the will under the direction of the court, and the other, as directed in Rem. & Bal. Code §1444, to settle it without the intervention of the court after certain acts have been done.”

The powers and duties of an executor under a non-intervention will do not stem from the statutes relating to ordinary executors which are set forth in the Appendix to Appellant’s Brief. On the contrary, they derive their statutory sanction from Rem. Rev. Stat. §§1462, 1463, which are set forth in the Appendix

to this brief, *infra*. (See *In re Krueger's Estate*, 180 Wash. 165, 168).

Further it is conceded that Mrs. Merrill's will, unlike the one in the *Larson* case, made an express bequest of the income of her property. She left it to her husband for life (Br. 3).

Under such circumstances, as hereinafter demonstrated, the law of this state is clear that income during the period of administration may not be used to pay the expenses of administration. Appellant argues that if paid out of income, such expenses might be used as a deduction in the income tax return of the estate to the extent to which they were not used as a deduction for estate tax purposes (Br. 12). Since income could not, under our law, be used for the purpose and since there is no showing that this law was violated, it seems to us unnecessary to discuss at length the argument of counsel on the point. It is admitted that under the regulations in force at the time the estate income tax returns were made in this case, no deduction could have been claimed in these returns for such payments even if made out of income (T.D. 5166). Counsel argue, however, that because some five years after these returns were due (and only following the change of law made in the Revenue Act of 1942) this inhibition was retroactively removed by T.D. 5513 (which became effective May 14, 1946) (Br. 20) this should be regarded as a statutory sop for the obviously unfair treatment which counsel contend should be Mr. Merrill's lot. The argument is unrealistic. The regulations in force at the time the returns were made precluded any such salvage by Mr.

Merrill, even if income could have been used for the purpose. The fact that the regulations were changed five years later — when it was too late for Mr. Merrill to have done anything about it — is immaterial, even though the new regulation was intended to be retroactive. Mr. Merrill could not and did not (as Mr. Martin testified—R. 40, 41) claim any income tax deductions based upon the \$10,000 of the fee which was not claimed as an estate tax deduction.

As we have said, under Washington law under the facts of this case, income could not be used to pay administration expenses.

In *Williamson's Estate*, decided March 15, 1951, the Supreme Court of the State of Washington squarely settles this point in the following language:

“In the case of an ordinary will, even though there be a dual administration and trusteeship, the executors might have such right of possession and control over the income as to enable them to hold it as a part of the estate funds and out of it defray and pay such items as taxes, insurance and necessary expenses in the upkeep of the income property, but under a nonintervention will setting forth such a plan as appears in the will before us, the right to receive income from the death of the testatrix becomes apparent.” 38 Wn. (2d) 259, 265.

Further, the court says:

“The intention of the testatrix, coupled with the statute, made it mandatory that the expenses of administration be paid out of the corpus of the estate. We have found no case in this state deciding this precise question. Having reached

the conclusion that both the will and the statute contemplates payment of administration expenses out of the corpus of the estate, it would seem that reference to authority would be unnecessary. However, reference may be made to 33 Am. Jur. 946, Life Estates, §424; 135 A.L.R. 1322, and *Estate of Schiffmann*. 86 Cal. App.(2d) 638, 195 P.(2d) 484." 38 Wn.(2d) 259, 266.

Accordingly we submit that any question about income from this property during the period of administration is immaterial and the *Larson* case is not at all in point. Should this court, however, see fit to incorporate in the opinion herein, a dictum concerning the present authority of that case, it would help resolve the doubts of many members of the Washington bar and would undoubtedly be welcomed by them.

We have no quarrel with the assertion by counsel that the disallowance of part of a fee as a deduction for purposes of the estate tax, because unreasonably large, is not a determination of whether such fee, when paid, constitutes taxable income, if this is the point to which counsel cite *Anderson v. Bowers* (C.A. 4) 170 F.(2d) 676, at page 14 of their brief. But no such question is here involved. Here the *amount* of the fee has never been challenged. It was set by the state court and the amount of it was approved in the audit of the Estate Tax Return. The only question here was whether the whole fee, or only half, could be taken from Mrs. Merrill's share of the community property. Mr. Merrill acquiesced in the position that under the *Lang* case, only one-half could be taken from her half and hence that only one-half of the fee

could be claimed as a deduction in the Estate Tax Return. We contend that since only one-half could be taken from her half, the other half of the fee, if paid at all, could only be paid out of Mr. Merrill's half (his own property) and that, whether paid or not, this half did not constitute income to him.

If the *Anderson v. Bowers* case is cited as authority for the further proposition that the doctrine of constructive receipt is applicable to the facts of this case and that Mr. Merrill constructively received the full fee of \$20,000 because he had available funds of Mrs. Merrill's portion of the estate under his control at that time to have paid himself the full allowance² rather than merely an installment of \$12,500 which he took in 1939, this amounts to a confession that the judgment herein as to the second cause of action is correct, apart from any consideration of the main question which has been argued in these briefs.

If the government contends that Mr. Merrill received the full \$20,000 in 1939, it is obvious that the Revenue Agent was wrong in adding \$7,500 of it to Mr. Merrill's returned income in 1940 and that our contention in this respect is admitted.

McEuen v. Commissioner (C.A. 5) 196 F.
(2d) 127;

Weil v. Commissioner (C.A. 2) 173 F.(2d)
805, Cert. den. 338 U.S. 821;

²On December 30, 1939, the estate of Eula Lee Merrill had on deposit the sum of \$12,281.76 after the payment of the \$12,500 to R. D. Merrill by check dated December 23, 1939 (R. 13).

Ross v. Commissioner (C.A. 2) 169 F.(2d)
483, 492;

7 A.L.R.(2d) 735.

On page 14 of Appellant's Brief reference is made to the case of *United States v. Lewis*, 340 U.S. 590. If by this reference counsel seek to raise the doctrine of receipt under a claim of right which the *Lewis* case supports, we wish to call to the attention of the court that this is the first time in this litigation that such a point has ever been raised. We, of course, do not know the reason for the delay. We do know, however, that at the time this case was tried below, if the point had been seasonably raised we would have had opportunity to file a claim for refund based on a loss sustained in 1943,³ in accordance with the formula approved in the *Lewis* case, for any part of the recovery which might have been denied us in this case by reason of the application of the doctrine of the *Lewis* case. At the time of the trial below, 1943 was still a year open to adjustment as far as Mr. Merrill's income tax liability was concerned. That is not true now. The statute has run in the interim. Under such circumstances, we do not believe that this court should consider the point. *United States v. Waechter* (C.A. 9) 195 F.(2d) 963.

The *Lewis* case, in any event, could not apply to the second cause of action, involving the year 1940. The doctrine of the *Lewis* case, as we understand it, is based upon supposed practical necessity which requires each

³The overpayment was actually repaid on August 14, 1943 (R. 16).

tax year to be treated as a separate package. If a taxpayer receives a payment during a given year and in good faith claims it to be income, he must report it as such, even though it is established in a subsequent year that his claim was not valid. No case applying the doctrine has ever held, so far as we have been able to discover, that it forbids adjustments *within* the year.⁴ If a client by mistake overpays me and during the year the mistake is discovered and the obligation to repay the excess is acknowledged, such excess does not constitute income. If I actually repay the item during the year, this is obvious. Nor logically does it make any difference in case my client and I agree that the excess shall be considered a loan or advance which I am to repay at a future date. (See *Carey Van Fleet*, 2 B.T.A. 825.) This is precisely what happened in the instant case. During the very month in which he received the second installment, Mr. Merrill acknowledged the mistake, and had the accountant make appropriate entries to rectify it. Subsequent actual repayment merely confirmed the bona fide character of the whole transaction. Nothing in the *Lewis* case would require extension of its admittedly harsh rule to cover such a situation.

We cannot believe that counsel are serious in suggesting that Mr. Merrill, a trustee who had admittedly appropriated to his own use more of the trust funds than was his due, is not shown to have been obligated to return the overpayment. For this reason we shall not discuss the case of *Crellin v. Commissioner*, 17 T.C. 781, wherein the decision was based upon the holding

⁴See *Curran Realty Co. v. Commissioner*, 15 T.C. 341.

that under the facts there involved, there was no such obligation.

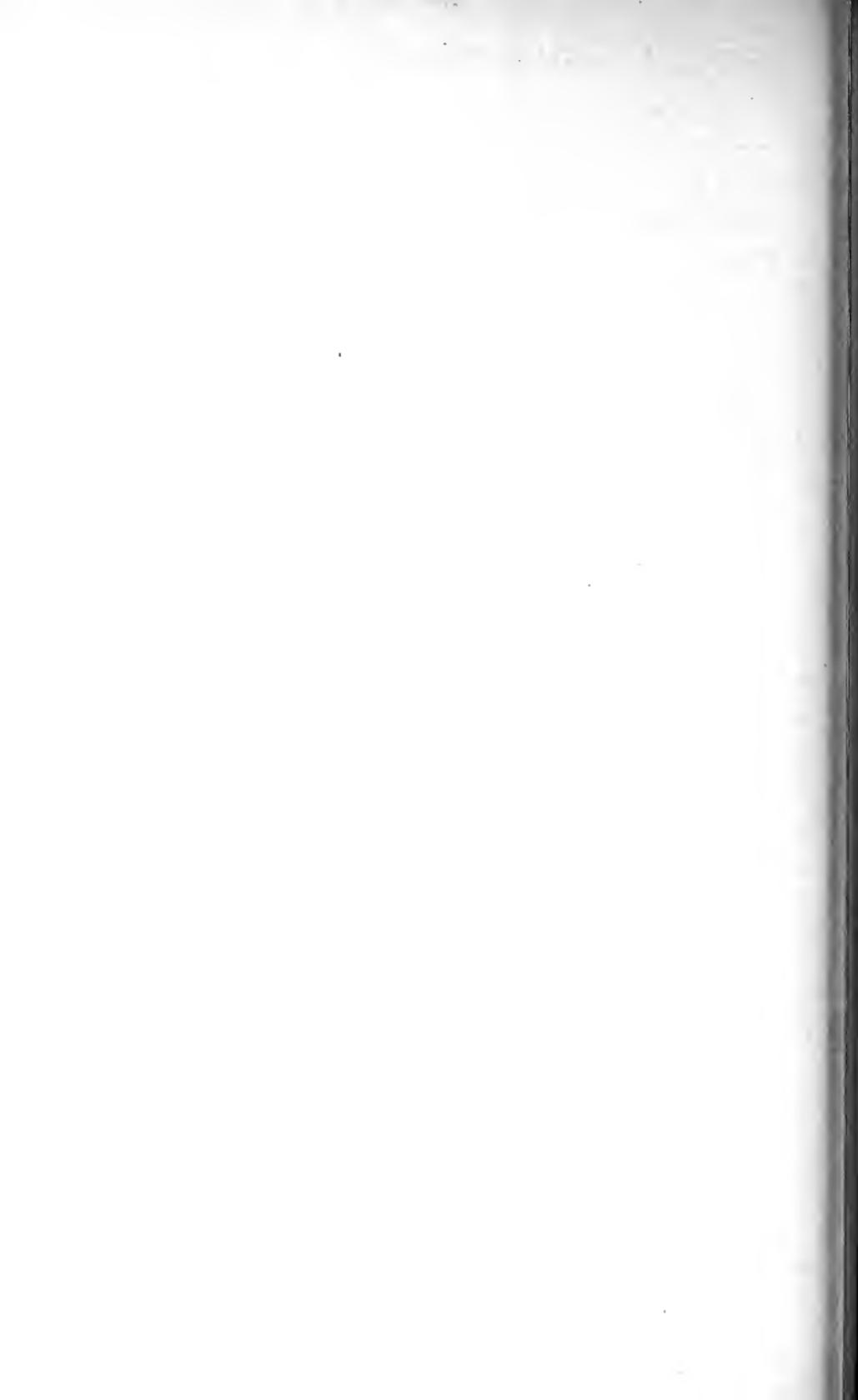
Having above demonstrated that Mr. Merrill's sole income from the executor's fee was derived in 1939, we believe we have thereby fully answered Appellant's alternative contention (Br. 15).

CONCLUSION

For the foregoing reasons, we urge that the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

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RAYMOND G. WRIGHT,
ARTHUR E. SIMON,
Attorneys for Appellee.



APPENDIX

Remington's Revised Statutes of Washington

XIII.

Settlement of Estates Without Administration

§1462. Settlement without court intervention—Order of distribution—Mismanagement—Citation. In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that such estate shall be settled without the intervention of any court or courts, and where it duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the court on the filing of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit the will to probate and to file a true inventory of all the property of such estate and give notice to creditors and to the state board or person having charge of the collection of inheritance tax, in the manner required by existing laws. After the probate of any such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the last will and testament shall so provide. But when the estate is ready to be closed the court, upon application, shall have authority and it shall be its duty, to make and cause to be entered a decree finding and adjudging that all debts have been paid, finding and adjudging also the heirs and those entitled to take under the will and distributing the property to the persons entitled to the same, such decree to be made after

notice given as provided for like decrees in the estates of persons dying intestate. * * * (L. '17 p. 666, §92.)

§1463. Powers of nonintervention executors. Executors acting under wills such as are mentioned in the last preceding section shall have power, after the filing of an inventory of the estate, if the said estate has been adjudged solvent, to mortgage, lease, sell and convey the real and personal property of the testator without an order of the court for that purpose and without notice, approval or confirmation, and in all other respects administer and settle the estate without the intervention of the court. (L. '17, p. 667, §93.)

No. 13392

United States
Court of Appeals
for the Ninth Circuit

WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

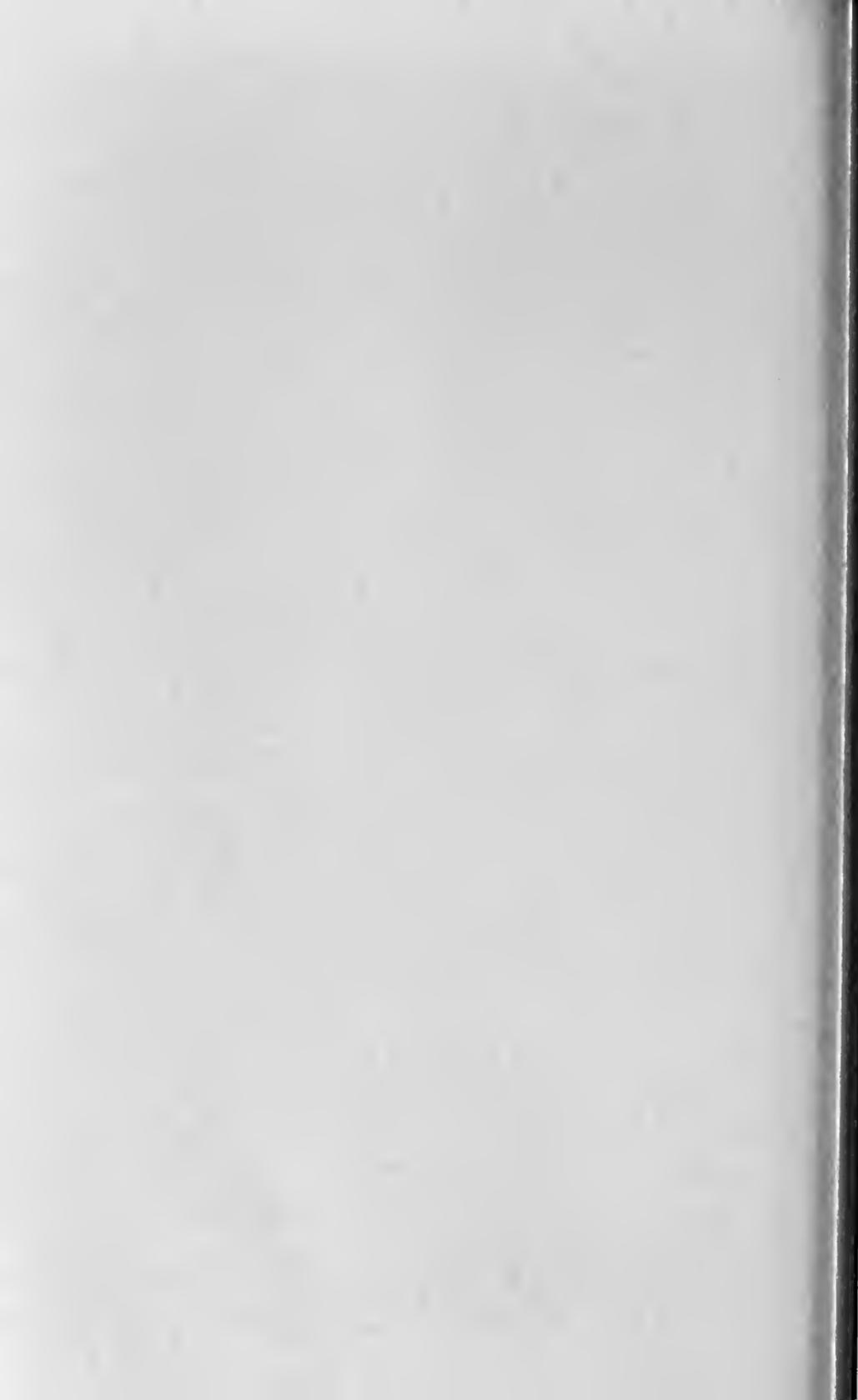
FILED

SEP 2 1952

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN

CLERK



No. 13392

United States
Court of Appeals
for the Ninth Circuit

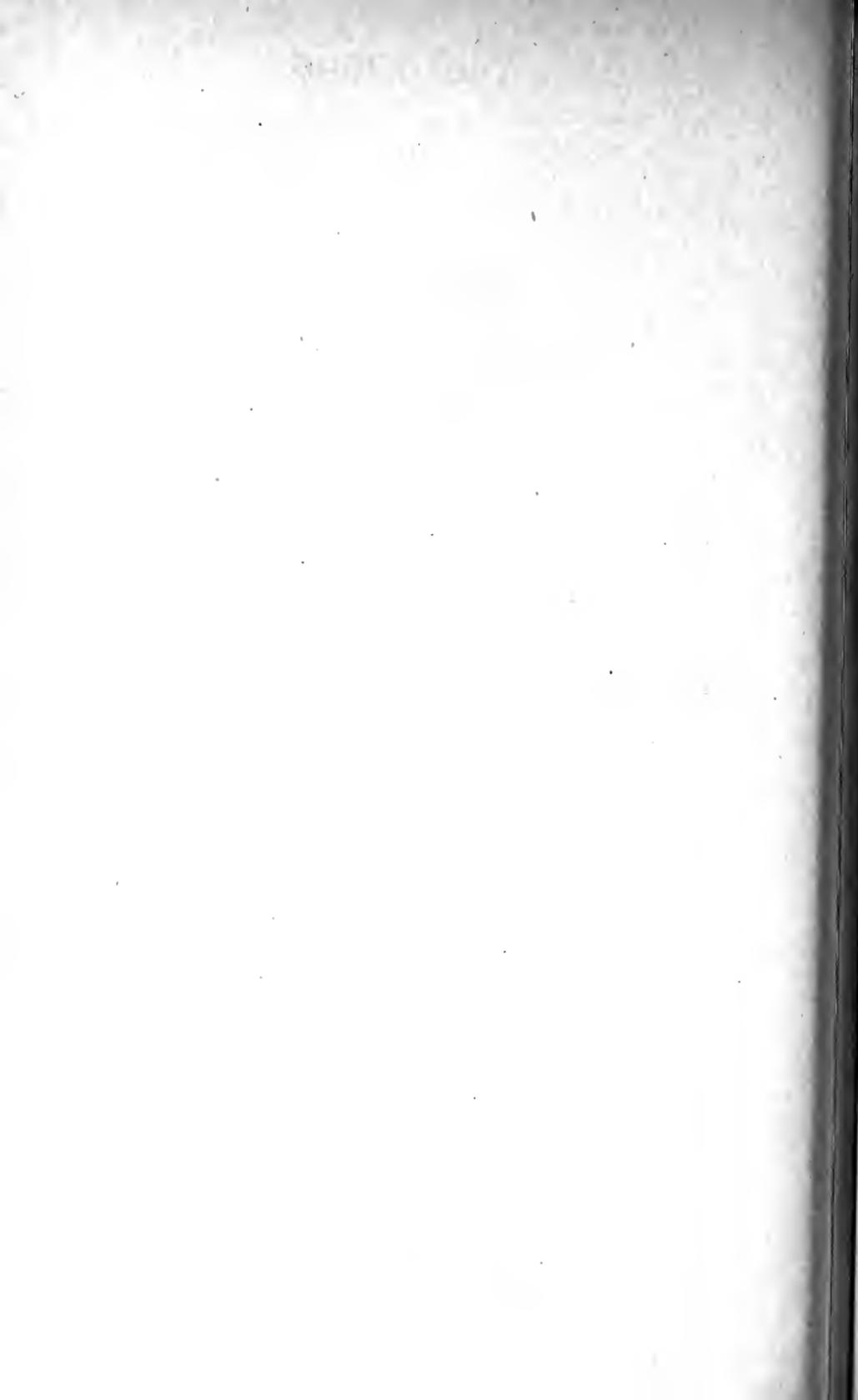
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

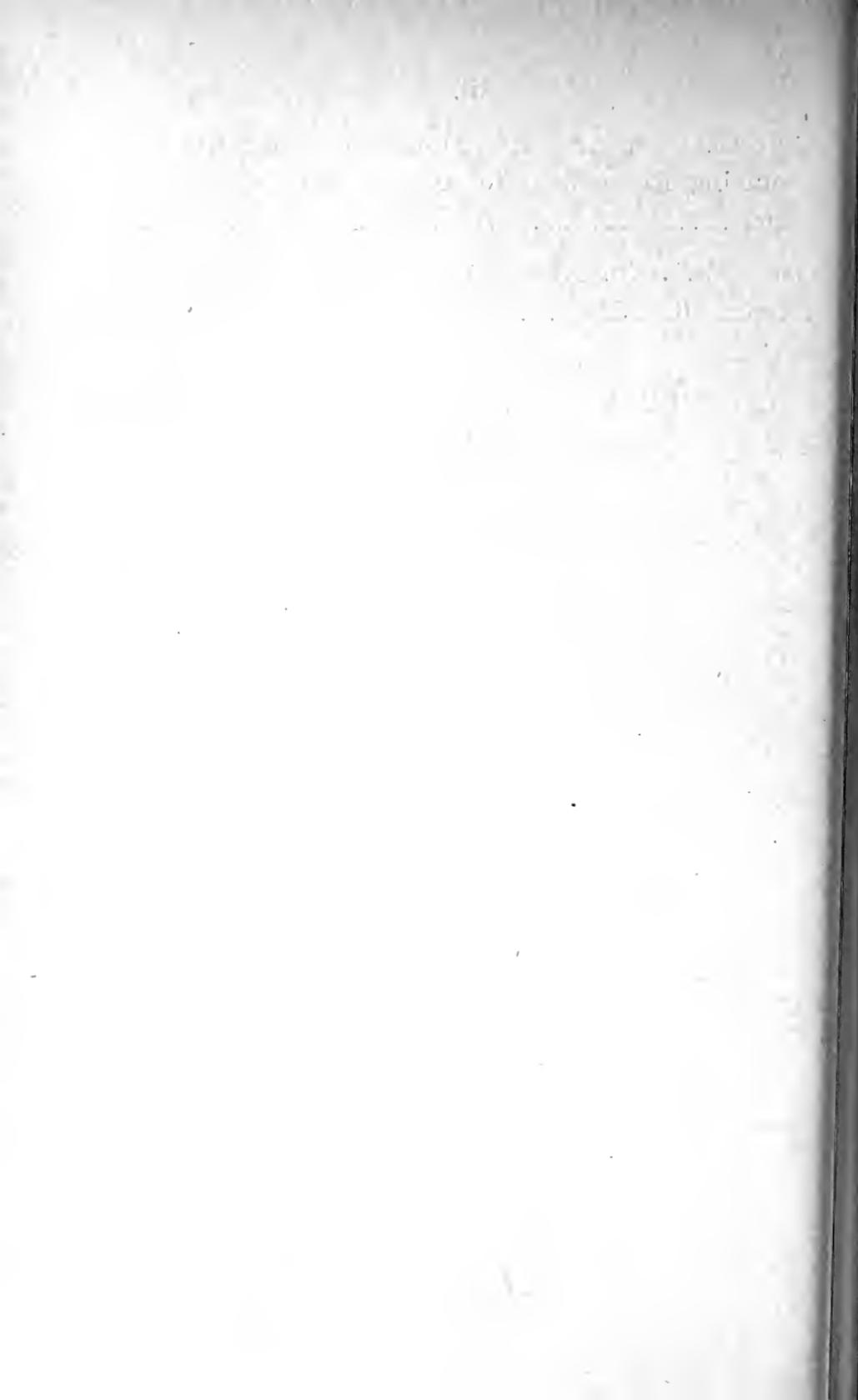
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NAMES AND ADDRESSES OF COUNSEL

Messrs. BOGLE, BOGLE & GATES,
ROBERT W. GRAHAM,

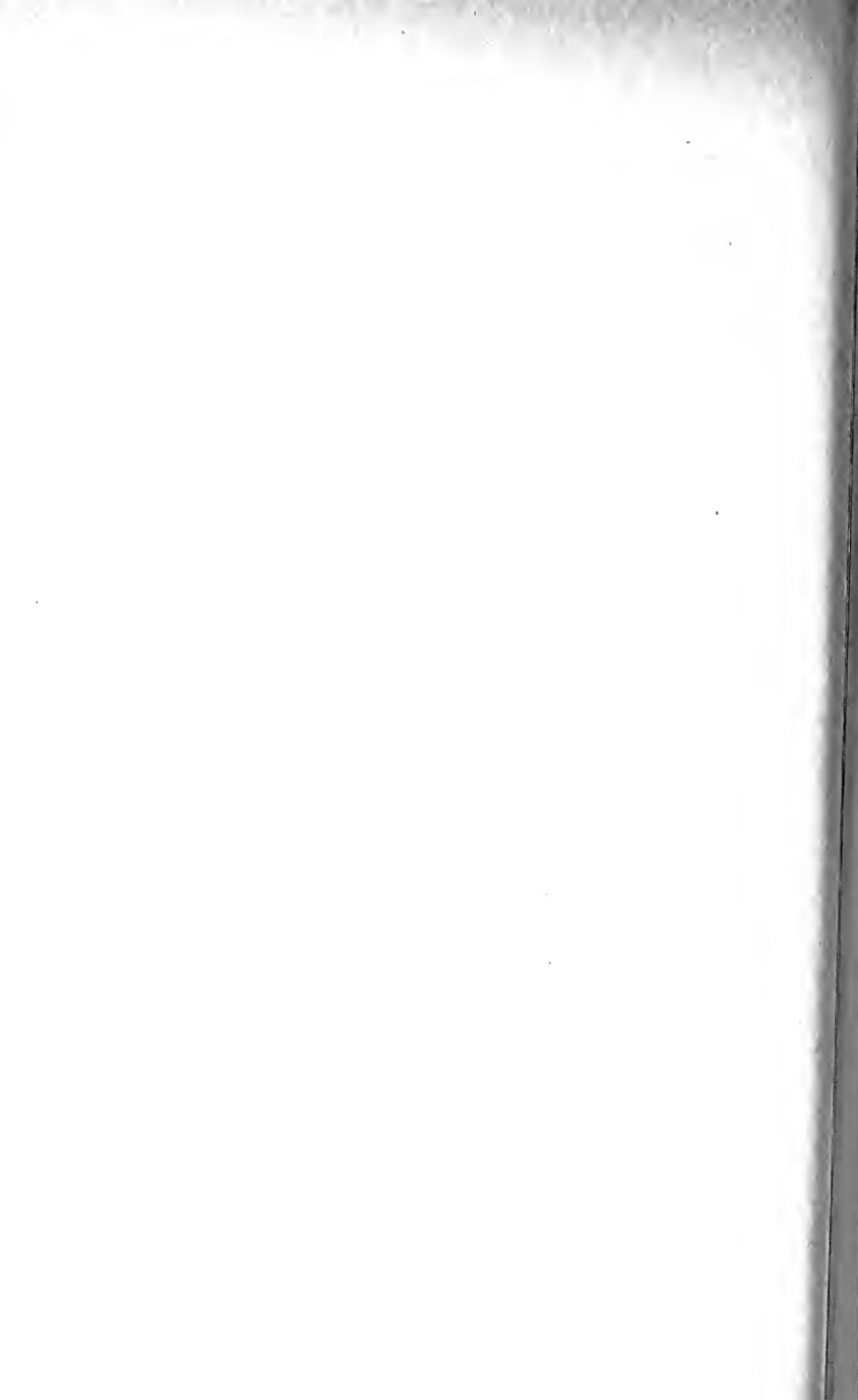
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Attorney for Appellee,
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Messrs. FREDERICK P. HOLBROOK,
HOWARD F. FRYE,

Attorneys for Appellee,
905 Second Ave. Bldg.,
Seattle 4, Washington.



In the District Court of the United States, Western
District of Washington, Northern Division

Civil No. 3047

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WEST SIDE FORD COMPANY, a corporation,
Defendant.

MOTION FOR ORDER REQUIRING RE-
SPONDENT TO APPEAR, TESTIFY AND
PRODUCE CERTAIN DOCUMENTS

To the Honorable Court:

The United States of America, Plaintiff herein, appeals to this Honorable Court pursuant to Section 705 (a) of the Defense Production Act of 1950 (Public Law 774, 81st Congress) as amended by Defense Production Act Amendments of 1951 (Public Law 96, 82nd Congress) for an Order requiring West Side Ford Company, a Washington corporation, respondent herein, to appear by and through its President, Robert E. Malone, and give testimony and produce certain documents described in the Subpena Duces Tecum annexed hereto and marked Exhibit A.

Plaintiff respectfully avers as follows:

1. At all times mentioned herein the West Side Ford Company has been engaged in the business of selling new and used automobiles at 3922 West Alaska Street, Seattle, Washington, within the ter-

ritorial jurisdiction of the Court, and subject to regulations issued pursuant to the foregoing Defense Production Act as amended.

2. Jurisdiction of this proceeding is conferred upon the Court by Section 705 (a) of the Defense Production Act of 1950 as amended.

3. Plaintiff is empowered under the provisions of Section 705 (a) of the said Defense Production Act to issue subpoenas to obtain such information from and take the sworn testimony of any person as may be necessary or appropriate to the enforcement of the administration of the Defense Production Act.

4. On the 26th day of March 1952, as set forth more fully in the affidavits annexed hereto, John H. Binns, Seattle District Enforcement Director of the Office of Price Stabilization, pursuant to a delegation of authority emanating from the President of the United States, issued the Subpoena Duces Tecum marked Exhibit A, which commanded Robert E. Malone, President of the said West Side Ford Company, to appear before him at the Seattle District Office of Price Stabilization, 905 Second Avenue Building, at 10:00 o'clock a.m., March 31, 1952, and give testimony and bring certain documents with him, which documents are required to be kept by regulations issued pursuant to the Defense Production Act of 1950 as amended.

5. The Subpoena was duly served on the said Robert E. Malone on the 26th day of March, 1952, as more fully appears from the affidavit of service filed herein and made a part hereof.

6. The said Robert E. Malone intentionally failed and refused to obey the said subpoena in that on the

31st day of March, 1952, the said Robert E. Malone did not appear at the time commanded in the subpoena, or at any other time, as appears more fully from the affidavit of the District Enforcement Director which is annexed hereto and made a part hereof.

7. Wherefore, Plaintiff prays that an Order be issued directing the respondent to appear forthwith at the Seattle District Office of Price Stabilization and give testimony, and produce documents described in the Subpena Duces Tecum attached hereto.

Dated this 3rd day of April, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney

/s/ FREDERIC P. HOLBROOK,
Special Assistant United States
Attorney

/s/ HOWARD F. FRYE,
Trial Attorney, Office of Price
Stabilization.

PLAINTIFF'S EXHIBIT A

United States of America
Economic Stabilization Agency
Office of Price Stabilization

SUBPENNA DUCES TECUM

To: Robert E. Malone, President, West Side Ford
Co., Inc., 3922 West Alaska St., Seattle, Wash-
ington:

You Are Hereby Commanded to appear in the

Office of Price Stabilization, at Room 408, 950 Second Ave. Bldg., in the city of Seattle, State of Washington, on the 31st day of March, 1952, at 10:00 o'clock a.m., to give testimony concerning SR 5 to GCPR and CPR 83, under Defense Production Act of 1950, as amended.

And to bring with you and produce for inspection at said time and place, the following books, records and documents: Records and invoices relative to all sales of new automobiles sold from December 19, 1950 to present date, including records of service performed on said automobiles.

In Testimony Whereof, the undersigned, an officer designated by the Director of Price Stabilization, has hereunto set his hand this 25th day of March, 1952, at Seattle, Washington.

/s/ JOHN H. BINNS,

District Enforcement Director, Office of Price Stabilization, 905 Second Ave. Bldg., Seattle, Washington.

Note.—Section 705 (a) of the Defense Production Act of 1950, Public Law 774, 81st Congress, provides:

In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in this subsection, the District Court of the United States for any district in which such person is found or resides or transacts business, upon application by the President, shall have jurisdiction to issue an

order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of court may be punished by such court as a contempt thereof.

Under section 705 (c) of the Defense Production Act of 1950, you may, prior to the return date of this Subpena, furnish the Agency with a true copy of the above-identified books, records, and documents (certified by you under oath to be a true and correct copy), or you may enter into a stipulation with the Agency as to the information contained in the above-identified books, records, and documents.

Return of Service

State of Washington,
County of King—ss.

John P. Colman, being duly sworn, says that he is over 18 years of age and that on 26th day of March, 1952, at Seattle, Washington, he served this Subpena on the above-named individual by personally delivering a original to him.

/s/ JOHN P. COLMAN

Subscribed and sworn to before me, a Notary Public, this 26th day of March, 1952.

[Seal] /s/ WILLARD M. FARMAN

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

Harold F. Nelson, affiant being first duly sworn on oath, deposes and says:

1. That he is a Special Agent-Attorney employed as Chief of the Consumer Goods Enforcement Section, Seattle District Office of Price Stabilization.

2. That affiant on or about March 25, 1952, acting in his official capacity during the course of an investigation to determine compliance by West Side Ford Company with Supplemental Regulation 5 to the General Ceiling Price Regulation, issued March 2, 1951 (16 F.R. 1769 et seq.) and Ceiling Price Regulation 83 issued November 15, 1951 (16 F.R. 10595) requested William Bishop, Office Manager of the said company to permit a microfilming of sales records of new automobiles.

3. That the said William Bishop referred the question to the law firm of Bogle, Bogle, and Gates.

4. That R. W. Graham of the said law firm, acting on behalf of West Side Ford Company, refused to permit the request and in fact refused any inspection of the records whatsoever.

5. That a Subpena Duces Tecum was issued and served March 26, 1952, commanding William E. Malone, President of the West Side Ford Company, to appear at 10:00 a.m., March 31, 1952 and give testimony and bring with him certain documents.

6. That at 10:15 a.m., March 31, 1952 R. W. Graham of the said law firm telephoned affiant and

stated that, pursuant to his advice, Robert E. Malone would not appear.

7. That investigation had prior to the aforesaid request consisted only in spot checking base period sales and that a detailed audit of all sales is necessary in order that complete facts as to prices charged by West Side Ford Company be made available to the Office of Price Stabilization so that overcharges, if any, may be determined and in order that the duties imposed by law on the affiant may be carried out.

/s/ HAROLD F. NELSON

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington,
residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Philip E. Hartwick, affiant being first duly sworn on oath, deposes and says:

1. That he is a Special Agent-Investigator employed by the Seattle District Office of Price Stabilization.

2. That on June 27 and June 28, 1951 at the specific written direction and authority of the District Enforcement Director, John H. Binns, affiant called at the place of business of the West Side Ford Company and checked the ceiling price list maintained by that corporation. Investigation was made by way of a spot check of base period sales for the period December 19, 1950 to January 26, 1951, inclusive.

3. That no detailed audit of sales either prior or subsequent to the base period was made or attempted.

/s/ PHILIP E. HARTWICK

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington,
residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

John H. Binns, affiant being first duly sworn on oath, deposes and says:

1. That he is the District Enforcement Director of the Seattle Office of Price Stabilization.

2. That in the exercise of discretion delegated to him by and through a chain of authority emanating from the President of the United States, affiant deemed it necessary and appropriate to the enforcement of the Defense Production Act of 1950, as amended, to obtain information from and take the sworn testimony of Robert E. Malone, President of the West Side Ford Company, Incorporated.

3. That affiant, after having assured himself that no adequate and authoritative data was available from any Federal or other responsible agency, on the 26th day of March 1952, issued a subpoena which commanded the said Robert E. Malone, President, West Side Ford Company, Inc., to appear in the Office of Price Stabilization, in Room 408, 905 Second Avenue Building, Seattle, Washington, on the 31st day of March, 1952, at 10:00 o'clock a.m., to give testimony and to produce certain documents.

4. That on March 31, 1952 the said Robert E. Malone intentionally failed to refused to obey the subpoena in that he did not appear in the Office of Price Stabilization, Room 408, 905 Second Avenue Building, Seattle, Washington, at the time commanded in the subpoena, or at any other time.

/s/ JOHN H. BINNS

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington,
residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

John P. Colman, affiant being first duly sworn on oath, deposes and says:

1. That he is a Special Agent-Investigator employed by the Seattle District Office of Price Stabilization.

2. That affiant on March 11, 1952 and for a period of ten days thereafter, accompanied by Special Agent Edward F. Apstein, in his official capacity and at the specific direction and authority of the District Enforcement Director, John H. Binns, called at the West Side Ford Company.

3. That invoices for the base period—December 19, 1950 to January 26, 1951—were examined to determine the allowable maximum prices applicable to the said West Side Ford Company's business.

4. That further check made of invoices for a month subsequent to the base period indicated consistent and a continued practice by the subject, West Side Ford Company, of charging in excess of maximum ceiling prices.

5. That a further detailed audit of all sales made from March 1, 1951 to date is required in order to determine the amount by which sales made by the subject, West Side Ford Company, exceeded the allowable maximum ceiling prices.

6. That only invoices and records required to be kept by Price Stabilization Regulations were examined by the affiant.

/s/ JOHN P. COLMAN

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington,
residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

OBJECTIONS AND ANSWER TO MOTION
FOR ORDER REQUIRING RESPONDENT
TO APPEAR, TESTIFY, AND PRODUCE
CERTAIN DOCUMENTS

1. There has been a failure to define the scope and purpose of this investigation, as required by 50 App. U.S.C.A. 2155(a) and EP-2.

2. The District Enforcement Director has failed to comply with the terms of the delegation of authority to him to sign and issue subpoenas.

3. There has been a failure by petitioner to show that the data sought herein are not available from any Federal or other responsible agency.

4. There has been a failure by petitioner to observe the pattern of enforcement envisioned by the statute and regulations.

5. There has been a failure to show the relevancy and materiality of the information sought to the purposes of the inquiry.

6. The subpoena is too vague and unreasonable to be enforced.

7. The subpoena, owing to its vagueness, lack of definition of scope and purpose, and unreasonableness, is contrary to the rights guaranteed to respondent by the Fourth Amendment.

8. The court should not lend its aid to undue and unreasonable harassment of respondent.

Dated this 10th day of April, 1952.

/s/ BOGLE, BOGLE & GATES

/s/ ROBT. W. GRAHAM,

/s/ J. KENNETH BRODY,

/s/ C. CALVERT KNUDSEN,

Attorneys for Respondent

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

William L. Bishop, being first duly sworn, on oath deposes and says as follows:

1. Affiant is now and has been at all times mentioned herein an employee of Westside Ford, Inc., respondent in the above-entitled action, in the capacity of Business Manager during the period December 19, 1950, to November 1, 1951, and in the capacity of Assistant General Manager thereafter.

In affiant's capacity as Business Manager and as Assistant General Manager affiant has become thoroughly familiar with the types and extent of the various records, invoices and other documents maintained by respondent relative to sales of new automobiles and service performed on said automobiles.

2. Those records consist of the following types of documents:

(a) Customer invoice. The customer invoice is furnished to each buyer of a new or used car or truck. Attached hereto as Exhibit A is a copy of the form used by respondent prior to the imposition of price controls. After the imposition of SR 5 to GCPR on March 1, 1951, respondent was forced to adopt a new form of invoice, at substantial cost to itself, to comply with the requirements of the regulation. A copy of the new form is attached hereto as Exhibit B. Customer invoices are numbered consecutively and filed according to number. During the period beginning December 19, 1950, and ending March 28, 1952, approximately 1,200 customer invoices were rendered by respondent covering all sales of new and used automobiles and trucks. Only approximately 365 new automobiles were sold by respondent during that period. In order to separate those customer invoices covering new automobiles from those covering used automobiles and new and used trucks each of the 1,200 invoices rendered must be separately examined. The invoices are not segregated in the files according to the type or age of the vehicle covered.

(b) Customer purchase order. Each time a new

or used truck or automobile is ordered by a purchaser, the purchaser executes a customer purchase order setting forth a description of the vehicle involved and the terms and conditions of the sale. A copy of the form used by respondent at all times mentioned herein is attached hereto as Exhibit C. These customer purchase orders are unnumbered and are filed in a folder bearing the name of the customer. The folders are filed alphabetically. In order to assemble those customer purchase orders pertaining to the sale of new automobiles during the period commencing December 19, 1950, and ending March 28, 1952, the customer invoices covering those sales must first be separated from customer invoices covering the sales of other vehicles. Then, by referring to the name on each customer invoice, the folder containing the purchase order can be extracted from the filing cabinet and the purchase order removed from the folder. Affiant estimates that approximately 365 folders must thus be located in order to obtain the customer purchase orders relative to new cars sold during the period mentioned.

(c) Purchaser's Statement. Each time a vehicle is sold on any extension of credit the purchaser fills out an application containing information as to his status as a credit risk. The form used by respondent at all times mentioned herein is attached hereto as Exhibit D. This application is unnumbered and is filed in the folder referred to above along with the customer purchase order and various miscellaneous documents. In order to obtain those applications relating to new car sales during the period

specified in the subpoena the same procedure must be followed as is described above with regard to customer purchase orders.

(d) Conditional Sale Contract. Respondent makes a substantial part of its sales under a conditional sale contract. Attached hereto as Exhibit E is the form of contract used by respondent at all times mentioned herein. After the sale the contract is filed in the folder referred to above with regard to customer purchase orders, and that same procedure must be used to obtain contracts involving new cars sold during the period from December 19, 1950, to March 28, 1952.

(e) Used car valuation. Each time a purchaser's used automobile is taken by respondent as a trade-in on a new automobile, the Sales Manager computes the value of the trade-in on the used car valuation form, a copy of which is attached hereto as Exhibit F. After that computation is made the net cash price to the customer can be ascertained. This form is unnumbered and is filed in the folder bearing the customer's name. Those used automobile valuation forms relating to new automobile sales during the December 19, 1950, to March 28, 1952, period can be obtained by using the procedure outlined above with reference to customer purchase orders.

(f) Inventory card. Respondent maintains a file of inventory cards covering all new vehicles bought and sold by it. A copy of the card form used by respondent at all times mentioned herein is attached as Exhibit G. That card reflects the status of the

vehicle with regard to accessories and carries certain other data. When a vehicle is sold that card is compared with the inventory tag on the vehicle to confirm the accessories charges and check the equipment attached. The cards are numbered with the house number of the vehicle covered and are filed in numerical order. Approximately 365 cards out of 415 pertain to new automobiles, and all 415 must be examined to separate those pertaining to new automobile sales from those pertaining to sales of other vehicles during the December 19, 1950, to March 28, 1952, period. These cards are not segregated in the file according to the type of vehicle covered.

(g) Inventory tags. Attached to each new automobile is an inventory tag, a copy of which is attached hereto as Exhibit H. This tag contains information concerning the description of the vehicle and the attached accessories. When the vehicle is sold, the tag is removed and placed in the same folder that holds the customer purchase order. In order to obtain the tags relating to the sales of new automobiles during the December 19, 1950, to March 28, 1950, period, the same procedure must be followed as is described above with regard to customer purchase orders.

(h) New and used car record. A record of each vehicle purchased or otherwise procured by respondent is maintained on its new and used car record, a copy of which is attached hereto as Exhibit I. This record shows the cost data with regard to each vehicle, and traces the subsequent sales of trade-ins so that the ultimate net profit on each new automobile

sale can be computed. The form is unnumbered and is filed according to date. To separate those forms pertaining to new automobile sales from those pertaining to sales of other vehicles during the December 19, 1950, to March 28, 1952, period will involve examination of approximately 600 forms to procure approximately 365. The forms are not segregated in the file according to type and age of vehicle.

(i) Repair Order. A repair order is executed by Service Department personnel each time work is performed upon a vehicle by a mechanic or other workman employed by respondent. Attached hereto as Exhibit J is a copy of the form used by respondent at all times mentioned herein. Repair orders are numbered consecutively and filed according to number. During the period commencing December 19, 1950, and ending March 28, 1952, approximately 13,000 repair orders were utilized and filed in the course of respondent's operations. Neither affiant nor any other person has any way of knowing how many of those 13,000 repair orders pertain to work done on new cars, but affiant estimates that between 300 and 500 so pertain. In order to separate those repair orders covering work done on new automobiles from those covering work done on other vehicles, each of the 13,000 repair orders utilized must be separately examined. The orders are not segregated in the files according to the type or age of the vehicle upon which the work is done.

(j) Hard copy of repair order. Each repair order has a light cardboard copy on the back of which the workman records the number of hours worked

on the automobile doing each job performed. These hard copies are numbered consecutively. Attached hereto as Exhibit K is a sample of the hard copy used by respondent. Hard copies that bear the name of the customer owning the automobile are filed alphabetically. Those that involve work not performed for a customer, as would be the case where work is done on a car not yet sold, are filed separately in numerical order. Here, also, a total of approximately 13,000 hard copies is involved in two different files. After the original repair orders pertaining to new automobiles are separated out, both files of hard copies must be leafed through to pick out the numbers corresponding to the original copies in order to separate the hard copies pertaining to work done on new cars from those pertaining to work done on other vehicles.

(k) Car Sales Journal. Each time a car is sold all the financial details of the transaction are entered into the Car Sales Journal. The information in that journal is posted to the General Ledger at the end of each month. Approximately 48 pages of the Car Sales Journal are covered by information relative to car sales during the December 19, 1950, to March 28, 1952, period.

/s/ WILLIAM L. BISHOP.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Wash-
ington, residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

William L. Bishop, being duly sworn, on oath deposes and says as follows:

1. Affiant is and at all times pertinent to the above-entitled action has been an employee of respondent Westside Ford, Inc., in the capacity of Business Manager from December 19, 1950, to November 1, 1951, and in the capacity of Assistant General Manager thereafter. Both in his capacity as Business Manager and as Assistant General Manager affiant has become thoroughly familiar with the nature and extent of the various types of records and invoices maintained by respondent at all times mentioned herein. Both in his capacity of Business Manager and Assistant General Manager affiant was at all times mentioned herein exercising control and supervision over all clerical and office employees and was at almost all times during every business day present on respondent's premises and observing the conduct of business. In his said capacities affiant had occasion frequently to deal with representatives of the Seattle District Office of Price Stabilization who visited respondent's premises and made various inspections thereupon, and affiant had occasion to deal with other representatives of the Seattle District Office of Price Stabilization via the telephone.

2. On or about April 26, 1951, a Mr. Freeze, who stated that he was a representative of the OPS, called affiant on the telephone with regard to a complaint made to the OPS alleging over-ceiling charges by respondent for a new automobile. It was determined that the complaint was not well-founded, and Mr. Freeze informed affiant that he so stated to the complainant. In the course of the several telephone conversations affiant had with Mr. Freeze, the charge respondent was making for handling and delivery under SR 55 to GCPR was discussed. Affiant stated to Mr. Freeze what the charge was and how it was arrived at. Mr. Freeze assured affiant approximately as follows: "You are within the regulation on those items but I would not buy a car on that basis." At that time Mr. Freeze approved the charge respondent was making for certain optional equipment placed on the automobile at the factory, namely an oil bath air cleaner, oil filter and positive action wipers.

During June, 1951, a Mr. Hartwick, who stated he was a Special Agent of the OPS, visited respondent's office to inspect its price structure. Affiant gave Mr. Hartwick copies of respondent's December 19, 1950, to January 26, 1951, base period price schedule and the items included in respondent's handling and delivery charge. Mr. Hartwick inspected several invoices to determine whether respondent was charging the prices determined to be its ceiling prices. Mr. Hartwick stated that it appeared that respondent was in compliance with the applicable price regulation at that time.

On July 24, 1951, a Mr. Nelson, who stated he was an attorney for the OPS, visited respondent's office and discussed with Mr. Henry Benson, a CPA employed by respondent, and affiant the handling and delivery charge made by respondent. After some inconclusive discussion Mr. Nelson left, stating that he would investigate other dealers and inform affiant of any developments.

On March 11, 1952, Mr. John P. Colman and Mr. Edward F. Apstein, Special Agents of the OPS, visited respondent's office, presented their credentials, and asked to examine respondent's records relative to base period prices on new automobiles and new car prices since the base period. Respondent furnished them with an office in which to work and gave them free and complete access to any and all records and invoices requested by them concerning sales and service of new automobiles during the calendar years 1950, 1951 and 1952. For a period of ten (10) days these two Special Agents spent the major portion of each business day on respondent's premises checking its invoices and records of every kind relative to the December 19, 1950, to March 11, 1952, period. These Special Agents stated to affiant that they were gathering information concerning the handling and delivery charge to be sent to Washington, D. C. They further stated at one time that the information would be used as data upon which to base a revision of the regulations concerning that charge, and at another time that the information was requested for a Congressional hearing. After having complete access to all of respondent's rec-

ords and invoices for a period of ten (10) days, these Special Agents requested permission to remove from respondent's premises all of respondent's records which they desired for that fifteen month period and photostat them. Affiant referred this request to Messrs. Bogle, Bogle & Gates, respondent's attorneys. Affiant has had no further requests from or conversations with these Special Agents since that time.

3. At no time did affiant or any other employee of respondent refuse any agent or employee of the OPS access to respondent's premises and records.

4. At no time did the OPS ever serve upon respondent or any of its employees an Inspection Authorization.

5. Affiant has personally examined all of respondent's invoices for the month subsequent to the December 19, 1950, to January 26, 1951, base period and confirmed the fact that no sale or sales were made by respondent during that period at a price in excess of the maximum ceiling price prescribed by the General Ceiling Price Regulation.

6. Respondent, through its officers and agents, has at all times since January 26, 1951, prepared and preserved all records, rendered all reports and posted all notices required by GCPR, SR 5 to GCPR and CPR 83.

7. Respondent, through its officers and agents, has at all times exercised every effort to comply with and has in the honest belief of affiant complied

with both the letter and spirit of every lawful regulation issued by the OPS applicable to its business.

/s/ WILLIAM L. BISHOP.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

Ralph E. Malone, being duly sworn, on oath deposes and says as follows:

1. Affiant is and at all times pertinent to the above-entitled action has been the President and General Manager of respondent Westside Ford, Inc., a Washington corporation.

2. During the month following the December 19, 1950, to January 26, 1951, base period respondent made no sales of new automobiles at a price in excess of the maximum ceiling price established under the General Ceiling Price Regulation.

3. During the period commencing December 19, 1950, and ending January 26, 1951, respondent sold forty-seven (47) new automobiles.

/s/ RALPH E. MALONE.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

Robert W. Graham, being duly sworn, on oath deposes and says as follows:

1. Affiant is an attorney of Messrs. Bogle, Bogle & Gates, attorneys for respondent Westside Ford, Inc.

2. At no time did affiant deny any employee of the OPS access to the premises and records of respondent. Affiant did inform Harold F. Nelson, Special Agent-Attorney employed as Chief of the Consumer Goods Enforcement Section, Seattle District Office of Price Stabilization, that respondent had determined that it would not consent to the removal of any records or invoices from its premises for photostating by the OPS.

3. On March 31, 1952, the aforesaid Harold F. Nelson stated via telephone to affiant, several times and emphatically, with reference to the scope and purpose of the inquiry being made of respondent, that the OPS was concerned only with SR 5 to GCPR and not at all with CPR 83, and that the question of CPR 83 was still a high-level policy question upon which the Seattle District Office of Price Stabilization had as yet no instructions.

/s/ ROBERT W. GRAHAM.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

C. Calvert Knudsen, being duly sworn, on oath deposes and says as follows:

1. Affiant is an attorney associated with Messrs. Bogle, Bogle and Gates, attorneys for respondent Westside Ford, Inc.

2. On March 29, 1952, affiant did, in the offices of respondent Westside Ford, Inc., examine the cus-

tomer invoices for all new automobiles sold by respondent during the period beginning December 19, 1950, and ending January 26, 1951, and did determine, from those invoices, the delivered price charged by respondent during that period for new automobiles. Those invoices show that during that period respondent sold forty-seven (47) new automobiles. Affiant completed his examination in a period of time not exceeding two (2) hours.

/s/ C. CALVERT KNUDSEN.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ J. KENNETH BRODY,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

John H. Binns, affiant, being first duly sworn on oath, deposes and says:

1. That he is the District Enforcement Director, Seattle Office of Price Stabilization, and that he makes this affidavit in support of the motion of the United States for an order to enforce an administrative subpoena.

2. That on March 3, 1952, affiant deemed it necessary and appropriate to the enforcement of price stabilization regulations governing sales of new automobiles that an investigation be made to determine the compliance by Westside Ford Company with Supplemental Regulation 5 to the General Ceiling Price Regulation and Ceiling Price Regulation 83.

3. That on March 3, 1952, affiant, acting in his official capacity, defined the purpose and scope of the investigation as follows:

“Westside Ford Co.

3922 West Alaska, Seattle, Washington.

By virtue of the authority vested in me as District Enforcement Director by Enforcement Procedure Regulation 4, the purpose and scope of this investigation, inspection, or inquiry are defined as follows:

1. The purpose of this investigation, inspection, or inquiry is to determine whether the above-named person has been and is complying with the Defense Production Act of 1950 and the following regulation(s) and/or order(s) issued thereunder

Para. 3 of SR 5 of G.C.P.R. and C.P.R. 83

2. This investigation, inspection, or inquiry may include any or all of the following as may be necessary or appropriate to effect the aforesaid purpose.

(a) Examining, copying and making notes of the books of account, statements, records, schedules, sales slips, papers, documents and any and all other writings of every kind, nature and description, required to be kept by the person named herein by the

Defense Production Act of 1950, and regulations or orders issued thereunder.

(b) Interviewing of such person or any other person or persons who may have, or are believed to have relative or pertinent information.

(c) Inspection of the premises and property of such person.

(d) Such other or further investigation, inspection, or inquiry as the District Enforcement Director may, in the exercise of his discretion, deem necessary or appropriate.”

4. That the original official record of the foregoing definition is in my custody as District Enforcement Director.

5. That a copy of the official record is annexed hereto marked “Exhibit 1.”; That affiant examined and compared the original with said copy and hereby certifies that the copy is true and correct in all particulars.

6. That the very nature of the data sought, namely, records, and invoices relative to all sales of new automobiles, assured the affiant that no such data were available from any Federal or other responsible agency.

/s/ JOHN H. BINNS.

Subscribed and sworn to before me this fourteenth day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington,
residing at Seattle, County of King.

EXHIBIT "1"

OPS Form No. 228 (4-51)

Office of Price Stabilization
Office of Enforcement

Investigation, Inspection, or Inquiry

Purpose and Scope

District Office

Case No.

This form must be filled out and made part of the file of the person under investigation, inspection or inquiry.

Person (See note below)—Westside Ford Co.

Address—3922 West Alaska, Seattle, Wn.

Purpose and scope of Investigation, Inspection, or Inquiry.

By virtue of the authority vested in me as District Enforcement Director by Enforcement Procedure Regulation 4, the purpose and scope of this investigation, inspection, or inquiry as defined as follows:

1. The purpose of this Investigation, Inspection, or Inquiry is to determine whether the above-named person has been and is complying with the Defense Production Act of 1950 and the following regulation(s) and or order(s) issued thereunder

Para. 3 of SR 5 of G. C. P. R. and C. P. R. 83.

2. This Investigation, Inspection, or Inquiry may include any or all of the following as may be necessary or appropriate to effect the aforesaid purpose.

[x] A—Examining, copying and making notes

of the books of account, statements, records, schedules, sales slips, paper, documents and any and all other writings of every kind, nature and description, required to be kept by the person named herein by the Defense Production Act of 1950, and regulations or orders issued thereunder.

[x] B—Interviewing of such person or any other person or persons who may have, or are believed to have relative or pertinent information.

[x] C—Inspection of the premises and property of such person.

[x] D—Such other or further investigation, inspection, or inquiry as the district enforcement director may, in the exercise of his discretion, deem necessary or appropriate.

Additional instructions and remarks—See attached file.

The District Enforcement Director is assured that the data herein sought are not available from any Federal or other responsible agency.

/s/ H. F. NELSON,
Consumer Goods.

OPS District Enforcement Director—(Signature)

/s/ JOHN H. BINNS.

Date: 3/10/52.

Note—Under Section 702(a) of the Defense Production Act of 1950, the word “person” includes an individual, corporation, partnership, association, or any other organized group of persons or legal successor or representative of the foregoing.

I attest and certify that the foregoing is a true and correct copy of the official record in my custody.

/s/ JOHN H. BINNS.

[Endorsed]: Filed April 14, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

William L. Bishop, being first duly sworn, on oath deposes and says:

1. Affiant is and was at all times mentioned herein Assistant General Manager of Westside Ford, Inc., respondent in the above-entitled proceeding.

2. In the ten (10) day period from and after March 11, 1952, during which Mr. John P. Colman and Mr. Edward F. Apstein, Special Agents of the OPS, examined respondent's records as is more fully set forth in affiant's previous affidavit in this proceeding, affiant repeatedly asked said Special Agents what the purpose of their inquiry was. Said Special Agents stated to affiant that they did not know what the precise nature of the inquiry was, but that no specific complaint was being investigated and no violation was being investigated. Said Special Agents said that an "industry check" was being

made and that the information was "for Washington, D. C."

3. After that time, but before the subpoena concerned in this proceeding was served, Mr. Nelson, Special Agent-Attorney for the Seattle District Office of Price Stabilization, telephoned affiant and stated that no complaint or violation was being investigated, that an "industry check was being made" and in support of said statement further stated that a certain other automobile dealer was being checked at the same time.

4. No written or other determination of the scope and purpose of the inquiry being made was ever served upon or otherwise communicated to respondent or any of its officers and employees.

/s/ WILLIAM L. BISHOP.

Subscribed and sworn to before me this fourteenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed April 14, 1952.

In the District Court of the United States,
Western District of Washington,
Northern Division

Civil No. 3047

UNITED STATES OF AMERICA,
Petitioner,
vs.

WESTSIDE FORD COMPANY, a corporation,
Respondent.

ORDER ENFORCING ADMINISTRATIVE
SUBPOENA

The above-entitled petitioner's motion for an Order requiring respondent to appear, give testimony, and produce certain documents described in the Subpoena Duces Tecum filed herein, marked Exhibit A, having come on for hearing in the above-entitled Court, setting without a jury, the Honorable John C. Bowen, United States District Judge, presiding, J. Charles Dennis, Frederic P. Holbrook, and Howard F. Frye, appearing for the petitioner, and Bogle, Bogle and Gates appearing for the respondent and moving papers and supporting affidavits having been introduced, and after argument said motion having been submitted for decision, and it appearing to the Court that pursuant to Section 705 (a) of the Defense Production Act of 1950, as amended, Ralph E. Malone, President, Westside Ford Company, Inc., on the twenty-sixth day of

March, 1952, was personally served with a lawful and duly executed Subpoena Duces Tecum to appear, give testimony, and produce certain documents before the District Enforcement Director of the Seattle Office of Price Stabilization, and that the said Ralph E. Malone, President of Westside Ford Company, Inc., intentionally failed and refused to appear with the said documents on the thirty-first day of March, 1952, as commanded by the said Subpoena Duces Tecum;

It is hereby ordered that Ralph E. Malone, President, Westside Ford Company, Inc., is directed and required to produce and permit the inspection and copying or photographing of the following designated new car records for the period December 19, 1950, to the present date which are in his possession, custody, or control: Customer invoices, car invoices, customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery, ceiling price lists effective after January 26, 1951, and any other records not specified above which contain the following information as to new cars sold:

- (a) Date of sale.
- (b) Make of automobile, model, year and body style, motor number and serial number.
- (c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special, or optional equipment.
- (d) State and local taxes.

(e) Charge for other services or items of equipment requested.

(f) Finance charges, name of finance company, method of payment and amount of cash received;

Provided that such inspection does not authorize microfilming of records and;

Provided further that the production of the said records or other documentary evidence shall be required at the premises of respondent at 3922 West Alaska Street, Seattle, during the reasonable business hours of respondent, commencing on April 23, 1952, and continuing until June 1, 1952.

Done in open Court this sixteenth day of April, 1952.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FREDERIC P. HOLBROOK,
Special Assistant U. S Atty.

/s/ HOWARD F. FRYE,
Trial Attorney.

[Endorsed]: Filed April 16, 1952.

[Title of District Court and Cause]

NOTICE OF APPEAL BY RESPONDENT
WESTSIDE FORD, INC.

To J. Charles Dennis, United States District Attorney; Frederick P. Holbrook, Special Assistant United States Attorney; Howard P. Frye, Trial Attorney, Office of Price Stabilization:

Please take notice that Westside Ford, Inc., respondent in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of this Court entered herein on the sixteenth day of April, 1952, and from each and every part of the said Order.

Dated this sixteenth day of April, 1952.

/s/ BOGLE, BOGLE & GATES and
/s/ ROBERT W. GRAHAM,
Attorneys for Respondent
Westside Ford, Inc.

[Endorsed]: Filed April 16, 1952.

[Title of District Court and Cause.]

COST BOND ON APPEAL AND
SUPERSEDEAS BOND

Know All Men by These Presents that the undersigned Westside Ford, Inc., a corporation, as principal and Anchor Casualty Company, a corporation organized under the laws of the State of Minnesota

and authorized to transact business as surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, petitioner in the above matter, in the penal sum of Four Thousand Dollars (\$4,000.00), lawful money of the United States, for the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors, jointly and severally, firmly by these presents.

Signed, Sealed and Executed this twenty-first day of April, 1952.

Whereas the above-named respondent and principal has appealed to the United States Court of Appeals for the Ninth Circuit from the Order Enforcing Administrative Subpoena heretofore made and entered herein by the Hon. John C. Bowen on the sixteenth day of April, 1952, ordering and directing Ralph E. Malone, President of Respondent to produce and permit the inspection and copying or photographing of certain documents at Respondent's premises commencing April 23, 1952; and

Whereas, the respondent desires to effect stay of proceedings upon said order pending such appeal;

Now, therefore, if the terms of said order shall be satisfied and complied with together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the order is affirmed; and if there shall be satisfied and complied with in full such modification of said order and such costs, interest, and damages as the appellate court may adjudge

and award, then this obligation to be void; otherwise to remain in full force and effect.

WESTSIDE FORD, INC.
a corporation,

/s/ By RALPH E. MALONE,
Its President.

ANCHOR CASUALTY COM-
PANY,
a corporation,

[Seal] /s/ By R. H. McDONALD,
Its Attorney-in-Fact.

The above cost and supersedeas bond is hereby approved.

Done in open Court this twenty-first day of April, 1952.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ ROBERT W. GRAHAM,
Attorney for Respondent.

Certified Copy of Power of Attorney attached.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that said papers constitute the record on appeal from that certain Order Enforcing Administrative Subpoena filed April 16, 1952, to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Motion for Order Requiring Respondent to Appear, Testify, and Produce Certain Documents, filed April 3, 1952.
2. Reasons and Citations in Support of Motion, filed April 3, 1952.
3. Notice of Presentation of Motion, filed April 3, 1952.
4. Affidavit of Harold F. Nelson, filed April 3, 1952.
5. Affidavit of Philip E. Hartwick, filed April 3, 1952.

6. Affidavit of John H. Binns, filed April 3, 1952.
7. Affidavit of John P. Colman, filed April 3, 1952.
8. Marshal's Return of Service of Motion, Notice and Affidavits, filed April 8, 1952.
9. Objections and Answer to Motion for Order Requiring Respondent to Appear, Testify, and Produce Certain Documents, filed April 10, 1952.
10. Memorandum of Authorities in Support of Objections to Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and Produce Certain Documents, filed April 10, 1952.
11. Affidavit of William L. Bishop, with Exhibits A to K inclusive, attached, filed April 10, 1952.
12. Affidavit of William L. Bishop, filed April 10, 1952.
13. Affidavit of Ralph E. Malone, filed April 10, 1952.
14. Affidavit of Robert W. Graham, filed April 10, 1952.
15. Affidavit of C. Calvert Knudsen, filed April 10, 1952.
16. Affidavit of John H. Binns, filed April 14, 1952.
17. Appearance of Respondent, filed April 14, 1952 (by Bogle, Bogle & Gates).
18. Affidavit of William L. Bishop, filed April 14, 1952.
19. Order Enforcing Administrative Subpoena, filed April 16, 1952, and entered in Civil Docket April 17, 1952.

20. Notice of Appeal by Respondent, filed April 16, 1952, with copy of letter, Clerk to U. S. Attorney transmitting copy of Notice of Appeal attached.

21. Cost Bond on Appeal and Supersedeas Bond (\$4,000.00), with Anchor Casualty Company as surety.

22. Praeceptum of Respondent for certified copy of affidavit of William L. Bishop with annexed exhibits A to K inclusive.

23. Court Reporter's Transcript of Hearing on Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and produce Certain Documents, filed May 15, 1952.

24. Designation of Contents of Record on Appeal, filed May 20, 1952.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellant for preparation of the record on appeal herein, to-wit:

Notice of Appeal, \$5.00, and that said amount has been paid to me by attorneys for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this twentieth day of May, 1952.

[Seal]

MILLARD P. THOMAS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States for the
Western District of Washington
Northern Division

No. 3047

UNITED STATES OF AMERICA,
Petitioner,
vs.

WESTSIDE FORD, INC., a corporation,
Respondent.

HEARING ON PETITIONER'S MOTION FOR
AN ORDER REQUIRING RESPONDENT
TO APPEAR, TESTIFY AND PRODUCE
CERTAIN DOCUMENTS.

Before: The Honorable John C. Bowen, District
Judge.

Seattle, Washington, April 14, 1952. [1*]

Appearances: J. Charles Dennis, United States
Attorney, Frederic P. Holbrook, Special Assistant
United States Attorney, and Howard F. Frye, Trial
Attorney, Office of Price Stabilization, appeared for
petitioner. Bogle, Bogle and Gates and Robert W.
Graham appeared for respondent.

(Proceedings on April 7, 1952.)

The Court: The next case on the calendar is
United States of America, Petitioner, vs. Westside
Ford, Inc., a corporation, Respondent, No. 3047.

Mr. Frye: This is a motion——

* Page numbering appearing at foot of page of original Reporter's
Transcript of Record.

The Court: Who appears for the opposing litigant?

Mr. Graham: Bogle, Bogle and Gates and Robert W. Graham. I don't know what counsel would suggest, but I would like to make this request of the Court, your Honor. These various documents were served upon Westside Ford on Friday morning last. Since that time, there have been several of us in our office engaged in substantial work upon these matters.

I understand that the Enforcement Division does not object to a reasonable continuance of the hearing of the matter, and it was suggested to me by telephone conversation that perhaps two or three days would be in order. I feel in view of the very substantial issues which are here presented, [2] your Honor, there will be numerous problems which we will desire to submit a memorandum of authorities to the Court in response to a length memorandum which the Government has supplied, and we will also find it necessary to supply rather lengthy affidavits of fact in order that this matter may be considered.

The Court: Will it be convenient to do that next Monday?

Mr. Graham: I have this suggestion. I think counsel will undoubtedly agree that the matter would normally take, if all the issues were presented to the Court fully and adequately, perhaps 45 minutes to an hour each side.

The Court: I will not be able to give you that much time. There is not any day in the next month that I can do that. I will hear you on next Monday's calendar, at the end of the afternoon calendar.

Mr. Graham: It would be my suggestion that we set the matter on the afternoon calendar.

The Court: It will be placed on the calendar for next Monday afternoon, at the foot of the present calendar. There are two matters that could be lengthy on that calendar, I will do the best I can to accord counsel extra time, but you had better not expect as much time as you indicate.

Mr. Graham: We shall, in the light of that comment, be prepared to submit a rather full memorandum of authorities. [3]

The Court: Try to have all affidavits and memoranda on file by Thursday of this week, if you possibly can. This matter is continued one week from today, the fourteenth of April, at 2 o'clock in the afternoon, following the presently assigned calendar.

(Further proceedings on April 14, 1952.)

The Court: You may proceed in the Westside Ford matter, No. 3047.

Mr. Frye: As your Honor will recall, this is a motion to enforce an administrative subpoena which was issued pursuant to the Defense Production Act of 1950, Sec. 705 (a). I should like at this time to get that statute before the Court.

The Court: I would be glad to have that assistance.

Mr. Frye: I will mark the pertinent section.

The Court: Pages 20 and 21, with a certain paragraph, Sec. 705 (a), blocked off on the right?

Mr. Frye: Yes, your Honor. You will note that section provides that: "The President shall be entitled, while this Act is in effect and for a period

of two years thereafter, by regulation, subpoena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and [4] take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder.”

Your Honor, the general ceiling price regulation, with supplemental regulation 5, and Ceiling Price Regulation 83 are the regulations which apply to the defendant's business. I submit these regulations to the Court only to cite the record-keeping requirements of the regulations. It is not our purpose to go into the substantive part of the regulations today, because they are not an issue.

Your Honor will note that General Ceiling Price Regulation, Sec. 16, which I have marked, requires that individuals subject to the regulation keep certain records available for examination by the Director of Price Stabilization, both base period records and current records. The same requirements are contained in the supplemental regulation 5 to this General Ceiling Price Regulation, and the same requirements are contained in Ceiling Price Regulation 83.

Only by examining those records is it possible for the District Enforcement Director to determine what price the defendant is charging for automobiles. The only evidence lies in his sales invoices for the base

period, December 19, 1950, to January 25, 1951, and following. That is all the [5] evidence that could be available to the Government.

To summarize the facts which are contained in the affidavits, the affidavit of John H. Binns, which was filed today in this action——

Mr. Graham: If the Court please, may I inquire is this affidavit properly before the Court.

The Court: What objection is there to it?

Mr. Graham: The matter was served at 11 o'clock. It tenders a substantial number of issues, which we would like to have the opportunity to respond to. It was served on counsel about 11 a.m. this morning.

Mr. Frye: If I may cite the local rules of the Court, if opposing affidavits are submitted two days prior to the hearing date, then the plaintiff or the one who makes the motion is entitled to submit rebuttal affidavits. It does not state at what time.

The Court: Let counsel point out the rule he speaks of and relate it to the facts or situation in this case. Cite the rule so counsel will know what you are talking about.

Mr. Frye: Rule 11, Hearing on Motions, states in part: "The moving party shall read (or, with the assent of the Court, may state) his notice of motion and moving papers. The opposing party shall thereupon read (or, with the assent of the Court, may state) the papers constituting his showing in opposition. The moving party shall not be entitled to [6] adduce any matter which is merely cumulative or corroborative of the papers served with the notice

of motion, except by special leave of court; but if the showing of the opposing party shall contain any new matter, the moving party shall be entitled to rebut such new matter, and for that purpose shall be entitled to a continuance of the hearing for a reasonable time, if he desire it.”

This is particularly the part which I had reference to: “If, however, the opposing party shall have served on the moving party copies of the papers constituting the showing in opposition at least two days before the hearing, the moving party shall not be entitled to any continuance on account of the new matter, but in such case the moving party may read affidavits strictly in reply if served before the hearing begins,”—11 o’clock this morning, I take it, is prior to the time the hearing began—“and the hearing shall proceed unless the Court for special reasons otherwise orders.”

The Court: Mr. Graham, does that apply?

Mr. Graham: If the Court please, the rule which counsel has read indicates that the Government may have opportunity to submit rebuttal matter, as counsel has quoted it. However, the matter which counsel for the Government submitted is not in rebuttal to any matter which we have submitted, and the material which now counsel seeks to put [7] before the Court is a condition precedent of his right to bring the action, not his right to initiate the request for enforcement order. There are a number of matters I would like to raise as to this affidavit, **if this is the appropriate time.** There are some substantial legal questions; principally, there has never

been any such scope and purpose determination served upon the respondent or upon any officer or employee thereof.

It is our contention that there are a number of legal issues raised with respect to the affidavit now tendered, your Honor, and it certainly is incumbent upon counsel for the Government to offer us the opportunity to so respond. Those matters are squarely at variance with the pleadings and the affidavits which were submitted in support of the Government's original papers.

The Court: Will you name the affiant? There is a great mass of material from Bogle, Bogle and Gates, but I see nothing so far from the opposing side.

Mr. Frye: There is not a great mass of material, your Honor, but there is an ample brief to support the Government's position.

The Court: When did you file it?

Mr. Frye: It was filed about three weeks ago, your Honor.

The Court: There is an affidavit of Colman, filed [8] April 3. There is an affidavit of Binns, filed April 3. Is that the one you are talking about?

Mr. Frye: The one we are talking about, I believe, is the one your Honor was just given by the clerk, which was filed today.

The Court: What have you to say in response to the argument just made by Mr. Graham about the character of the affidavit?

Mr. Frye: Counsel states it is not strictly in rebuttal of the affidavits which they have filed. We

take the position that there is a presumption that a public official acts legally and regularly. The bulk of the defendant's brief was an allegation, unsupported by any fact, that the District Director had acted illegally. That of course, puts the burden of going forward on the Government to rebut that allegation, which we have done by the affidavit filed this morning. I see no reason for not proceeding, as counsel knows full well every day we delay, and there has been some delay already, part of the Government's cause of action for damages is wiped out. There is only a year on this.

The Court: When was the action commenced?

Mr. Frye: The action was filed April 3rd, your Honor.

The Court: I think that the Court has given counsel [9] reasonable opportunity to present all the factual data that they wish, and I believe the rule fairly covers the situation and makes it appropriate for the Court to proceed. You may do so.

Mr. Frye: Just to summarize the affidavits, your Honor, the one that is in question now, I should like the Court, with the permission of counsel, to make a pen and ink change in the date set out there.

The Court: Let counsel have it and get it in order.

Mr. Graham: What is the request?

Mr. Frye: In paragraph 2 and paragraphs 3, I want to substitute March 10.

Mr. Graham: If the Court please, the affidavit, which was sworn to before a notary public of the State of Washington, recites that on March 3 cer-

tain actions were taken. The copy of the document which is attached very clearly and plainly states that there was a certain document executed on March 10. It is obvious from the affidavit. Counsel now wants to change the Director's affidavit and now make his statement at variance with what the Enforcement Director has sworn to, and I submit counsel or nobody else has the right to come to this Court and ask to change somebody else's affidavit.

Mr. Frye: The date was inserted due to clerical inadvertence. [10]

The Court: The Court does not feel it appropriate in this case to make the change over objection. Many times things like this are done, but it seems that counsel on both sides are contesting and resisting every step, and in view of the objection the Court will not approve of it. You may proceed.

Mr. Frye: I turn to the facts of Mr. John Binns' affidavit, in which counsel will not stipulate as to the date. The important thing, of course, is that the affidavit carries with it an exhibit which is certified to by Mr. Binns, who is the custodian of the official record, and that copy establishes definitely the action taken, namely, that the purpose and scope of the investigation was defined as required by Enforcement Procedure Regulation 2. If I may get that regulation before the Court—

The Court: Where is it?

Mr. Frye: I am handing it up now. The important thing to realize is Sec. 2, which requires that subpoenas shall be issued only after the scope and

purpose of the investigation, inspection or inquiry to be made have been defined.

The Court: Does this affidavit seek to define them, or purport to do so?

Mr. Frye: The exhibit to the affidavit defines the scope, your Honor. [11].

The Court: Where are the lines and figures and words that do so?

Mr. Frye: Down from the top of the page, the purpose and scope of investigation, and the small No. 1. "The purpose of this investigation, inspection, or inquiry is to determine whether the above-named person has been and is complying with the Defense Production Act of 1950 and the following regulations and/or orders issued thereunder." Then it specifies paragraph 3 of Supplemental Regulation 5 of the General Ceiling Price Regulation and CPR 83.

The scope is also defined in the small No. 2 underneath, which authorizes certain examination and interviewing, etc. That is the official record of the definition of scope and purpose which was made by the District Enforcement Director prior to the time any investigation was authorized, or certainly prior to the time any subpoena was issued in this action.

Pursuant to that definition of the scope and purpose, the affidavits will indicate that on March 11, and continuing for a period of some ten days, investigators at the place of business of the defendant examined certain records, consisting mainly of their sales records for the base period. According to the affidavit of Mr. John Colman, during the course of

examination, after the base period, he found numerous overcharges. [12]

Now, then, there is a direct conflict in the affidavits, whether or not those overcharges existed. Mr. Bishop and Mr. Malone of the defendants have denied that they ever made an overcharge, whereas the Government investigator has sworn that he found overcharges. In aiding the Court to resolve that conflict, I can only suggest that ever since that investigation was terminated, every effort has been made on the part of the defendant to suppress any evidence of overcharges and prevent any further examination of those sales invoices. The request was made to microfilm the records——

The Court: To microfilm?

Mr. Frye: To microfilm the records.

The Court: Who made that request, somebody on behalf of the Government?

Mr. Frye: Yes, your Honor. The affidavit of Mr. Harold Nelson will reveal that request, and that the defendant, acting by and through his counsel, Mr. Graham, refused permission to the Government to make that microfilming, and further refused any further inspection of the records whatsoever. There is also a direct conflict in the affidavits as to that fact.

The affidavit of Mr. Harold Nelson states that through counsel, the Government was refused any permission to examine the records further, even though those records [13] were required to be kept by the very regulations which applied to this defendant. However, the affidavit of Mr. Graham of

counsel denies that he ever refused such an inspection.

In aiding the Court to resolve that conflict, I can only suggest that if the Government had been permitted to examine those records, we would not be in court today trying to get a subpoena enforced. In fact, the Government would be willing now, as it has been in the past, to stipulate for an order that will allow the Government to go ahead and make an inspection of the records on the defendant's premises. However, the defendant is not willing now, nor has he been willing, to permit such inspection.

As I say, if the defendant is willing to permit inspection of the records, there is no use in going on with this hearing any further. However, he is not so willing, so we must continue. On the twenty-sixth day of March, a subpoena was issued, which is in the file marked Exhibit A, your Honor.

The Court: To which paper is it Exhibit A?

Mr. Frye: It is Exhibit A to the motion for order to enforce subpoena. It was filed on April 3 in the clerk's office.

The Court: Is it a form?

Mr. Frye: Yes, it is a form. It is an exhibit to the motion, and it is a form that is entitled United [14] States of America, Subpoena Duces Tecum. Your Honor will note that the president of the Westside Ford Company was commanded to appear in the Office of Price Stabilization, at Room 408, 905 Second Avenue Building, on the thirty-first day of March, 1952, at 10:00 o'clock a.m., to give testimony concerning SR 5 to GCPR and CPR 83, under

Defense Production Act of 1950 as amended, "And to bring with you and produce for inspection at said time and place, the following books, records and documents: Records and invoices relative to all sales of new automobiles sold from December 19, 1950, to present date, including records of service performed on said automobiles." It is signed John H. Binns, and the affidavit of service has been properly executed.

On March 31, the return date of that subpoena, the defendant, again acting through counsel, telephoned and stated that he would not comply with the subpoena. In brief, your Honor, every attempt the Government has made to get at this defendant's records, which are the only records that will indicate what he charged, whether or not he made overcharges, has been met by recalcitrant noncompliance on the part of the defendants.

The regulations which I introduced at the outset of the hearing provided that there were certain records that he had to keep for inspection by the Director of Price Stabilization. The defendant says, in effect, "I am above the law. [15] You cannot inspect those records." The statute says that the President has authority to issue subpoenas, and that the defendant is a person subject to the subpoena, but the defendant nevertheless says, "You cannot enforce the law as to me. I will not obey your subpoena."

I think surely the Court will not permit this sort of conduct to go any further, especially in view of the fact that, as I pointed out previously, every

day that elapses cuts off part of the Government's statutory action for damages. Every day of delay will mean that much difference.

The law which applies in a proceeding of this kind, I think, is clear. I should first like to dispose of the defendant's brief. It is some 27 pages long, but I think we can dispose of it rather quickly. He begins, of course, by alleging that the District Enforcement Director has acted illegally in that he did not define the scope and purpose of the investigation, and that he did not first assure himself that the data sought were not available to any other Government agency.

The affidavit of Mr. Binns, of course, and the official record to which it attests, indicates that any conditions precedent to the issuance of subpoena have been complied with, without a doubt. The defendant also says that there is a pattern of enforcement which the statute [16] requires that the Director has not complied with. He says, in effect, that first an inspection authorization should have been issued prior to the subpoena. Of course, the regulation requires no such thing, and admittedly the subpoena never would have been issued, in the first place, had the defendant been willing to comply with inspection authorization.

Then he goes on to show that the subpoena is too vague, and that it is unreasonable. It is interesting to note the affidavit of Mr. Knudsen, in which he sets out that he visited the defendant's place of business and in less than two hours was able to examine all the base period invoices of the de-

fendant and arrive at a proper ceiling. Less than two hours. I know Mr. Knudsen is a brilliant man. I went to law school with him. I am only sorry our investigators don't have the background of his ability.

However, the records indicate that our investigators were there for a period of about ten days, and the defendant now says that ten days was enough for us to examine records for a period of almost a year and a half. They say ten days is long enough to do that, but, on the other hand, they say five days is not enough time just to bundle the records up and bring them down, therefore, the request is unreasonable.

There is certainly nothing vague about the language of the subpoena. It specifies records and invoices relative to all sales of new automobiles sold from December 19, [17] 1950, to the present date, including records of service performed on said automobiles, sales invoices and records relative thereto. I can see nothing vague about that. If he had any question as to what that meant, he certainly didn't raise it, but merely decided he would not comply with it for any reason.

The last objection which the defendant raises is that the subpoena by reason of its various defects is contrary to the rights guaranteed to the respondent by the Fourth Amendment. Well, of course, there is no question of the Fourth Amendment in this case at all. The subpoena is not a search warrant. There is no question of probable cause. There is no suggestion that there was any illegal search or seizure going on.

There is some language in the Oklahoma Press Publishing Company case in which Mr. Justice Rutledge of the United States Supreme Court, in a wage and hour case, disposed of the Fourth Amendment very nicely. He said: "The short answer to the Fourth Amendment objection is that the records in these cases present no question of actual search and seizure * * * What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection * * *." [18]

I refer to the question of relevancy for a moment. Counsel for defendant has stated, being their whole argument on the fact, that there was no definition of scope and purpose, therefore, there could be no relevancy in any request that followed. The scope and purpose was defined. It wasn't required to be served on anybody, merely the definition of what was required. Having made that definition, the matter required in the subpoena is relevant on its face. It is not only relevant, but it is the only record, the only place where there is any evidence, which will allow the District Enforcement Director to determine the facts.

As to the objection that the Government is not entitled to microfilm the records, we have not alleged that we are entitled, although we do not concede it, but regarding this as no different than a motion to produce documents, if the evidence is accorded the Government there surely can be no objec-

tion to copying it or photographing it as is allowed by the Federal Rules of Civil Procedure, especially in view of the fact that the Defense Production Act requires that such information be kept confidential.

There is some suggestion that this requirement of bringing the books and records down to the Office of Price Stabilization is burdensome. I can only say that if it is burdensome, which I doubt, it is because the defendant was not willing to submit to inspection of the records on the [19] premises in the first place.

In short, your Honor, the only real question in this case is whether or not the Defense Production Act is going to be enforced. If this defendant can say to the Government, "You may not inspect my records even though the regulations require me to keep them for your inspection," if he can refuse to comply with a subpoena and get away with it, while all the time the statute of limitations is tolling, then, of course, so can everyone else do the same thing and it will simply be impossible to obtain any evidence as to the state of the business man's compliance.

If I may use the words of Justice Rutledge again, he said in that Oklahoma Press Publishing Company case: "The very purpose of the subpoena, as of the authorized investigation, is to discover and procure evidence and not to prove a pending charge or complaint. The statute leaves no room to doubt that Congress intended to authorize just what the Administrator did and sought to have the courts do. The Administrator's investigative function in

searching out the violations with a view to securing enforcement of the Act is essentially the same as the grand jury or the courts in issuing other pretrial orders for discovery of evidence and is governed by the same limitations. These are that he is not to act arbitrarily or in excess of his statutory authority.”

There is certainly no question as to the statutory authority. There has been no arbitrary acting. We have merely insisted that this subject is not immune from the law, but is subject to it like everyone else, and if there is one principle I know this Court stands for, it is that everyone is equal and ought to be equal before the law.

The Court: I will hear the opposing argument.

Mr. Graham: If the Court please, with the permission of the Court, I should like to discuss what I believe are the issues here tendered, and if it be the will of the Court for further elaboration beyond one or two points I should like to discuss, I should like to ask leave to have Mr. Brody continue the argument with reference to the case authority, if that would be agreeable. I would like to outline briefly, if I might, the facts that are of record in the affidavits here before the Court. I don't know whether the Court has had the opportunity of examining——

The Court: You may proceed just the same as if I had, and if you think there is something that should be called specifically to the Court's attention, you have sufficient time to do that.

Mr. Graham: I would like to call the Court's attention first to the fact that the affidavits disclose

that on two separate occasions last April and June, the respondent company was visited by representatives of the Office of [21] Price Stabilization, namely, Mr. Freeze and Mr. Hartwick, and the affidavit discloses that on examination of the pricing methods and practices of respondent, the company was advised on both those occasions that those pricing practices and activities were in conformance with the applicable regulations of the Director of Price Stabilization.

Now counsel has indicated that the respondent has refused to permit inspection of the records. The record here before the Court, your Honor, categorically denies that. Counsel's own statement does, and Mr. Colman and Mr. Apstein of the applicant's office staff called at the offices of Westside Ford and for a period of ten days those two gentlemen had complete access to every document and record that the Westside Ford possesses. There is no dispute as to that fact in the record.

It is stated in the affidavit of Mr. Colman that during that period of time, twenty man days, that they proceeded to make an inspection of the base period records and one month thereafter, and during that period of the base period and one month thereafter, the Westside Ford Company sold 57 new automobiles. I appreciate the kind comments made as to Mr. Knudsen's ability and aptitude, but the plain fact of record is that the work entailed in an examination of the base period records and that month thereafter consumed approximately two hours of Mr. Knudsen's time. Counsel calls [22] my

attention to the fact that there were 47 rather than 57 new automobiles sold during that period.

Now, I do not know what the two gentlemen did at the Westside Ford Company for that ten day period commencing on or about March 11, but I think the record is uncontroverted that the Westside Ford Company did everything that the statute calls upon it to do. They gave them complete access to all the records and files. They furnished a room for the two gentlemen to work in, and they were available to answer questions. Opportunity to examine the records required by the Act, and, as a matter of fact, opportunity to examine records far beyond those called for by the Act were the petitioner's for the asking.

The record also indicates, your Honor, that during the course of these various conversations with representatives of petitioner, there have been a lot of conflicting and controverting statements as to the nature or purpose or scope of the inquiry. The affidavits indicate that the respondent's representatives on different occasions have been advised that this information was sought to obtain a revision or clarification of the regulations. Also, they have been advised that this information was for the purpose of a Congressional hearing, and they were also advised that the information was needed for an industry check.

Finally, after this period of ten days, but when [23] every document and record in the office of the Westside Ford Company had been made available to the petitioner, the request was made for the oppor-

tunity to remove from the premises all the books, documents and records that the representatives desired to take some place for photostating, and at that time, frankly, the respondent felt that had been enough. It was following this subpoena.

I am not going to burden the Court with a recitation of the facts that before the Office of Price Stabilization there have been filed by this respondent and by some 100 to 150 other automobile dealers in the State of Washington requests for clarification and declarations as to the validity of certain of these regulations. That probably is not material to this inquiry, but I would like to call the Court's attention to a very basic problem that the petitioner is now confronted with, and for the purpose of reference I would like to call the Court's attention to Sec. 705 (a) of the Act, a copy of which has been furnished and referred to at page 1 of the respondent's memorandum.

The statute provides that the Director of Price Stabilization, or the President, acting through him, or such other person as he may designate, is authorized to require the keeping of information and books and records, etc., and to issue subpoenas, etc., and then there is this statement in the statute, your Honor, and I call the Court's attention [24] to the fact that this phrase in the statute finds no counterpart in the Emergency Price Control Act of 1942, and that phrase is this: "The President shall issue regulations insuring that the authority of this subsection will be utilized only after the scope and purpose of the investigation, inspection or inquiry to

be made have been defined by competent authority * * *.”

Now, that objection was presented in the objection to the petition on behalf of the respondent, and a memorandum of authority outlining the position of respondent was submitted. To indicate to your Honor, counsel for the petitioner has proceeded in his original motion or application upon the premise that the 1942 Act and the present Act are synonymous. I call the Court's attention to paragraph 7 of the petitioner's memorandum of authorities in support of his motion wherein he states with reference to these various cases decided under the 1942 Act: "The applicability of these cases is further emphasized, with respect to the Defense Production Act of 1950, as amended, by the traditional rule that re-enactment of a statutory provision identical in policy and scope, creates a presumption of legislative adoption of previous judicial construction."

When this petition was filed, counsel proceeded upon the premise that there was no need for a definition of scope and purpose of the subpoena or any other administrative [25] action, and now recognizing that he has been in error, an attempt to correct that is now made at the eleventh hour by service upon the respondent of an affidavit and an attached document. I would like to call the Court's attention—and I am not waiving the objection originally made to the consideration of this affidavit. The rule of court, local rule 11, provides that if the showing by the opposing party shall contain any new matter, the moving party will be entitled to

rebut. We came forward with no affidavits that entitle the petitioner to come forward with rebuttal, and I would like to make the objection for the record that the affidavit and the supporting documents be now admitted for consideration at this time. If that deemed to be overruled, as I understand the Court's ruling to be, I should like to present to the Court a supplemental affidavit of Mr. Bishop, serving a copy upon counsel.

The Court: You may have leave to serve and file that further affidavit of Mr. Bishop.

Mr. Graham: And that is without prejudice to the contention that the affidavit of Mr. Binns, served as of 11 a.m. today, is not properly before the Court at this time.

The Court: The Court permits you to preserve that objection.

Mr. Graham: The Court will note from the affidavit of Mr. Bishop that no copy of this document has ever been [26] served upon respondent or upon any of its agents, representatives or employees. I call the Court's attention, as did counsel, to the inconsistency in the affidavit of Mr. Binns as to the dates. I do not know what date Mr. Binns made the determination purported to be attached as Exhibit 1. I do not know what Mr. Binns did or whether it was executed on the third or entered on the tenth, twelfth or fourteenth, and frankly, I would like to know, your Honor.

You will note that the exhibit attached to Mr. Binns' affidavit recites in it, "See the attached file." Well, it seems to be incumbent upon the petitioner,

if he urges before this Court that a determination has been made in accordance with the statutory requirements, that we have an opportunity to find out what that determination was, and I submit to the Court that the exhibit is not a complete recital or record of the determination, and that as a condition we are entitled to examine Mr. Binns as to what was done and what action was taken and upon what premise he did act.

I would like to call the Court's attention to the proposition that this document and its attempted utilization here presents a very fundamental legal issue. The Emergency Price Control Act of 1942 did not require any such determination, your Honor, and Congress for good cause, apparently recognizing in the decisions under the Emergency Price Control [27] Act that for reasons of sound policy it should be required, required a determination of scope and purpose of whatever administrative action the Administrator sought to take, and I submit to the Court that such a question is not resolved by some gobbledegook in some administrative files and records.

If that statutory provision means anything, it means that the respondent is entitled to be advised at the time the request is made upon him as to what the scope and purpose of the information requested may be, and I think, as I have recited the facts behind this, that is a very pertinent question. It may determine what the respondent's actions will or will not be in response to this request, and I submit that

we, in view of the presentation at this time of a document which purports to be a resolving of the scope and purpose of the administrative action, that we have the opportunity to present to the Court whatever opposing factual information we may desire to present, and further, as a condition of that consideration of this document, we have the opportunity to inquire of Mr. Binns as to the documents or the premises upon which he did act, and further the opportunity of presenting to the Court the bases for my contention, which are simply these, that we are entitled to know before any request is made as to what the scope and purpose may be.

Now, that isn't so much discussion, your Honor, [28] and is perfectly plain from a reading of the affidavits before this Court that the determination of the scope and purpose of this inquiry is exceeding the material. An analysis of the regulations reveals that during three separate periods of time, there were three different price ceiling regulations in effect. For a period of time, the General Ceiling Price Regulation was in effect. It was in effect for the period of more than one month following the freeze date, and recalling the affidavit of Mr. Colman and the fact that he examined the books and records for one month following the freeze date, he was concerned and his allegations of fact about violation relate to a period when the General Ceiling Price Regulation was applicable, and the affidavits of Mr. Bishop and Mr. Malone are categorically that during this freeze date period under GCPR all sales were made in conformance thereto.

We are not going into the merits of whether or not violations have taken place at this stage of the proceedings. There was a second period covered, as the regulations reflect, there was a period in effect from March 1 through October 15 and the various dates subsequent thereto based upon the applicable Special Order issued under CPR 83, a period under GCPR Supplemental Regulation 5, when a different set of regulations was in effect. I call the Court's attention to my personal affidavit, reflecting a [29] telephone conversation with a Mr. Nelson of petitioner's staff, wherein it was stated categorically that the only inquiry related to Supplemental Regulation 5, there was no inquiry as to CPR 83. I do not know what the scope and purpose—maybe Mr. Nelson was in error. Maybe the subpoena inquires of different periods.

I call the Court's attention to the fact that not only do the substantive provisions of these regulations differ, but the requirement for record keeping thereunder and the pertinent material records thereunder are different. It seems to me, your Honor, that we certainly, being confronted at this time with the contention, that we now have a document which pulls the rug, so to speak, from a very basic issue which was raised in our memorandum here, that we have an opportunity first to determine what the Director did or purported to do under that statutory requirement.

We would like to see the attached file of the Director as to what he did and why he acted, and also I would like the opportunity to submit such

authorities as there may be—and obviously, since 11 o'clock this morning I have not had the opportunity of doing so—such authorities as there may be to support the contention that the scope and purpose determination must be made in advance of the administrative action and it must be served upon and communicated to the respondent in order that the statutory [30] provision may be required. This may be a kind of first impression, I have not had the opportunity of examining the authorities, but it certainly is in order to place ourselves in the position of advising the Court as to the proper authorities upon that proposition.

Now, as I see it, Your Honor, that question as to the requirements of the statute that a determination be made of the scope and purpose of the inquiry is fundamental, and if my contention on that proposition is correct, there is no need for us at this time to consider the additional questions as to the breadth, scope, etc., of the subpoena. If the Court desires to have comments with reference to those other issues which Mr. Frye has presented in the course of argument to the Court, I should like to have leave of the Court to ask Mr. Brody to present those matters for the Court's consideration. It does seem to me, however, that the basic problem here is whether or not the Administrator has complied with the statute, and I submit on this record he has not.

The Court: I will hear from Mr. Brody.

Mr. Brody: Your Honor, aside from the question of statutory compliance, we have cited a great

many cases in our brief to this point, that there is always a question before the Court when an application is made for an enforcement order on an administrative subpoena, there is always a [31] question of the relevancy and the materiality of the data sought. I believe that in petitioner's brief in support of his motion he made the statement, which we believe to be erroneous, that that finding of relevancy was solely in the hands of the Administrator or the administrative official who makes the determination to issue the subpoena, but we believe that the authority clearly points out that this is not so and that it is for your Honor to determine whether or not the material sought is relevant and material to the purpose of the inquiry. That is why, your Honor, it is so vital to make a proper determination of the purpose of the inquiry, and we have pointed out by reference to the affidavits submitted by petitioner that there seems to be considerable doubt as to the scope and purpose of this inquiry.

The affidavit of Colman refers to violations in the month following the base period. The subpoena itself asks for information concerning SR 5 and CPR 83, both of which went into effect much later than the base period. The affidavit of Mr. Graham states that the statement was made to him that this investigation was to be limited to SR 5. All of this goes to show, your Honor, the confusion which does exist as to the purpose of this inquiry.

Now, we have the affidavit of Mr. Bishop of the respondent, and his affidavit shows the tremendous

scope of the records that Westside Ford Company keeps. They keep [32] records of financing. They keep certain types of inventory records which show the various pieces of equipment that go onto each car. They keep a large number of records which perhaps have very little relevance to the pricing arrangements for the sale of the car. They keep thousands of repair orders, each repair order being written up separately and the petitioner has asked for the repair orders relating to the sales of new cars.

Now, some of this information may be relevant to the inquiry, providing that the purpose of the inquiry has been defined. Some of it may not. We certainly argue to this Court that a mere statement that they want all records is certainly not a statement which should receive the assent of this Court, and that all records should not be required to be produced until it has been shown what records are relevant to the purposes of the inquiry and why.

We have further argued that the Fourth Amendment may be an issue in this case, and Mr. Frye has cited to the Court the Oklahoma Press Publishing Company vs. Walling case. We certainly agree, your Honor, that in a case where the purpose of the subpoena is reasonably defined, where the information sought is bound to be relevant to the purpose of the subpoena and there is no illegal search, there is no unreasonable request, an order of enforcement should be issued. It is our contention that there has been no [33] adequate defini-

tion of purpose, that we do not know and this Court cannot tell from the record before it whether or not the material sought is relevant to the purposes of the inquiry.

The breadth of the subpoena appears to be unlimited, and in case of an unreasonable subpoena, and further, a subpoena which we contend is without the authority of law because it has not complied with the statutory requirements, then we have the issue of an illegal search and seizure under the Fourth Amendment. We do not argue independently that any administrative subpoena constitutes such a violation of the Fourth Amendment, but an administrative subpoena which is issued under these circumstances.

Finally, I should like to say, your Honor, that we have raised a point which every court which has had to consider the question of enforcement of these subpoenas has been sensitive to, and that is the question of whether the petitioner by his actions has shown himself worthy of the aid of the court in the enforcement of the subpoena. The court sits in an equitable capacity to determine whether it should lend its weight and its authority to the enforcement of the subpoena. We have shown your Honor the cooperation which respondent had at all times offered to the Office of Price Stabilization before the final request was made. We have shown the presence of their agents Freeze and Hartwick [34] upon the premises of respondent and the ten day period of examination, the fact that respondent furnished an office and made all of its records

available. All of this, your Honor, should emphasize the nature and extent of the requests that have been made upon the respondent.

We emphasize the affidavit of Colman and his statements of repeated violations, not because we seek at this hearing to have a finding made as to whether or not there were violations of the General Ceiling Price Regulation, we have submitted that to show the attitude which petitioner has taken toward respondent and the amount of harassment which respondent has undergone, an amount which is demonstrated by an allegation of violations concerning a period about which information apparently is not even sought in the fundamental subpoena.

It is interesting to note in a case in the Oregon courts in which an enforcement order was sought, where there had been three previous examinations, the Court denied the application for an enforcement order and it stated that "We should be very careful, when there have been repeated previous investigations, in exercising our equitable powers in aid of the enforcement order."

All of these considerations, and especially the fact that at 11 o'clock today an affidavit was filed purporting to go to the main issue of whether or not the statute [35] has been complied with, show the amount of notice, the amount of consideration which has been given to respondent by petitioner, and we therefore urge that, in addition to the chief point made by Mr. Graham of noncompliance with the statute, that there has been no showing of

relevance and materiality of the information sought, no definition of the scope of the information sought, that the subpoena is vague and unreasonable in failing to state it more accurately and failing to determine why it should be made available; that under all these circumstances, there may be a violation of the Fourth Amendment, and that under all the circumstances which we have considered, petitioner has not shown itself to be worthy of an order of enforcement from this Court.

Mr. Graham: If the Court please, in conclusion——

The Court: I did not know there were going to be so many arguments.

Mr. Graham: I would like to make a request, your Honor. I would like to make the request that we have an opportunity to respond to the affidavit of Mr. Binns within a reasonable period of time and with such memorandum of authority as may be——

The Court: The Court has to rule on this today. I think that a showing on behalf of the motion has reasonably been made, and the motion is granted, with this exception, that the production for copying and photographing may be [36] made at the plant of the respondent corporation and there will be no order of the Court at this time for the production at the offices of the enforcement officer who is acting for and on behalf of the United States of America, and there will be no liberty of microfilming of any documents or series of documents or total of records. It can only be done by photographing process, not microfilming, and the Court will reserve for

later developments to see whether or not I think it is a proper case for microfilming of the entire record.

Mr. Frye: Is the process of photostating proper, as distinguished from photographing?

The Court: If you have a photostating machine which you can take there and take some of these documents. I do not consent to your starting in with the first paper and photostating the entire corporate records. It is those papers thought to have material parts which are authorized, just the same as if you had a camera to photograph some paper you thought was material, but so far as starting with the first paper and going through the last, that is not approved.

The question is the time and place of production. I have said it shall be at the place of business of respondent. Are there so many rooms at that place of business that there might be some dispute as to which room would be a proper place? Is there any need for further clarification?

Mr. Frye: I don't see why there should be, as [37] long as there is an adequate place to do that work.

The Court: What kind of photostating machine have you?

Mr. Frye: What I was considering is the micro-filming machine, which can do the whole job.

The Court: The Court does not approve that.

Mr. Frye: As such, we have no photostating machine. That will be another agency.

The Court: If you furnish copies that indicate

that it is material and relevant to have a photostat or a microfilm of the entire record, I will have to hear that in the future. I do not foreclose your bringing that to the Court's attention in the future, but for the present, where you are seeking information, the Court does not approve of your microfilming the entire records of the company and taking it away from the plant, any more than the Court approves of taking all of the records of the company away from the plant and bringing them to the office of the Enforcement Director. I do not approve of that, but any record of the company is subject to this motion if the looking at it is in connection with Supplemental Regulation 5, and particularly Section 3 thereof, to the General Ceiling Price Regulation and Ceiling Price Regulation 83 under the Defense Production Act of 1950 as amended.

Mr. Graham: May I inquire, your Honor, do I [38] understand the Court's ruling to limit the Court's order to those documents which are required to be kept under the regulations issued pursuant to the Defense Production Act?

The Court: Is there any reason why that should not be?

Mr. Frye: No objection to that, your Honor. The records are amply specified in the regulation.

The Court: That is the intention of the Court. I would like it to be understood that Mr. Frye has said that the only machine he had for photostating was the microfilming machine, and I have directed, as the Trial Judge, that that machine be not used in this instance.

I would like the record to show expressly that the Court in this connection has overruled the objections of the respondent, except insofar as there is any implied sustaining of them in the specifications which the Court has made in connection with the ruling.

(Further proceedings on April 16, 1952.)

The Court: Do counsel for petitioner have anything to say?

Mr. Frye: Your Honor, this was set as an agreed order, but it has not yet been possible to reach any agreement. If I understood your Honor correctly last Monday, if there wasn't an agreed order you would hear it at 4:30 this [39] afternoon.

The Court: We will proceed to hear it now. Does opposing counsel have a proposed form of order?

Mr. Frye: You have one from each of us, your Honor.

Mr. Graham: If the Court please, I have an order which I believe conforms to what the Court ordered. I do not desire to be placed in the position of presenting an order in this matter. I obviously desire to reserve all appropriate objections and exceptions, but there is an order.

The Court: Let the record show the statement of attitude of counsel for respondent. Mr. Frye, what do you understand to be the points of divergence between counsel so far as the form of the suggested order is concerned?

Mr. Frye: Counsel telephoned me yesterday and asked that I make our order as specific as possible. Therefore, I have enumerated each and every document which we desire to inspect.

The Court: That is on page 2 of the order form?

Mr. Frye: Yes, your Honor. It details it so that there will be no misunderstanding as to which record the Government is entitled to look at. I tried to avoid any future controversy when I wrote this order.

The Court: Among other things, on page 2 it is stated that Ralph Malone, President of the respondent company, is directed and required to produce and permit the inspection [40] and copying or photographing—I thought as to photostating that you advised the Court that the only machine you had available which might be classed as a photostating machine was the microfilming machine.

Mr. Frye: Yes, your Honor.

The Court: I think you should strike that, because someone might interpret that as including the microfilming machine, and I do not so interpret it.

Mr. Frye: Below that there is a proviso which prohibits microfilming, as your Honor directed Monday.

The Court: Until I find out what the photostating machine is, I think I will strike this out. Then those materials which may be so inspected and copied or photographed are “customer invoices, car invoices, customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery, ceiling price lists effective after January 26, 1951, and any other records not specified above which contain the

following information as to new cars sold: (a) Date of sale; (b) Make of automobile, model, year and body style, motor number and serial number; (c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special or optional equipment; (d) State and local taxes; (e) Charge for other services or items of equipment [41] requested (undercoating, glazing).” Do you intend that those words in that parenthesis shall restrict the meaning of the more general terms “item of equipment requested”?

Mr. Frye: No, your Honor, that is just by way of example.

The Court: I am afraid that item would cause dispute as to meaning.

Mr. Frye: If we struck it out entirely, there would be no dispute then, perhaps, your Honor.

The Court: I wish counsel to know that if this order is used, the Court’s striking out of the parenthesis does not indicate that the Court disagrees with that former interpretation of items of equipment requested, but the Court struck it out for fear that someone might contend that those two kinds of such requested equipment or services were the only kinds of information that could be obtained.

“(f) Finance charges, name of finance company, method of payment and amount of cash received, Provided that such inspection does not authorize microfilming of records”. I am going to put a semicolon after the word “received” in line 18, instead of the period. Then there is another proviso, “Provided further that the production of the said rec-

ords or other documentary evidence shall not be required at any place other than the place where the said Ralph E. Malone usually keeps them." [42]

Is there any comment you wish to make, Mr. Frye, as to whether or not there is any reasonable basis of any contention that those specifications are not within the Court's ruling announced orally previously in this case?

Mr. Frye: I believe the records are not only within the general terms of the order, but they were drawn up particularly to avoid any further dispute in the matter.

The Court: Was the motion, in your opinion, reasonably construed, broad enough to cover these items, these specifications?

Mr. Frye: The motion was to enforce the subpoena, which used very broad words, your Honor, and that was what counsel objected to by telephone. He wanted the language to be specific. The language of the subpoena says, "records and invoices relative to all sales of new automobiles sold from December 19, 1950, to present date, including records of service performed on said automobiles." That was the order which your Honor enforced, with certain restrictions. As a convenience both to the Court and to the respondents, I have detailed exactly the records we need so as to put the matter beyond any further dispute.

The Court: Does that complete your statement?

Mr. Frye: Yes, your Honor.

The Court: I will hear any objections Mr. Graham may have. [43]

Mr. Graham: If the Court please, obviously in an order directing the inspection of documents, the respondent is entitled to a specification of the documents ordered to be produced. The Court will note from the affidavit of Mr. Bishop as to the various records maintained, and I would like to call the Court's attention to the provisions of CPR 83. The Court ordered that permission for inspection should go to those documents which are required to be maintained by the regulations.

The proposed order directs the inspection of "car invoices, customer invoices, customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery,". I call to the Court's attention that there is no requirement in the regulations for the maintenance of any records indicating cost of labor and materials expended in the preparation and conditioning of new cars for delivery. There is no such requirement.

There is a requirement in Sec. 10 of CPR 83 which I would like to submit for the Court's inspection. I have indicated the commencement of the section, your Honor. That information, as your Honor will note, is required to be maintained and placed upon customer invoices, and I think you will note that those appear to be what counsel has attempted [44] to enumerate in his elaborated form of order.

The Court: Item e under that Section 10 in this pamphlet CPR 83, Report 107, apparently of the

date of 11-12-51, reads: "Charge for other services or items of equipment requested (undercoating, glazing, etc.)."

Mr. Graham: May I continue for a moment, your Honor? You will note counsel in his order requests the inspection of customer invoices, car invoices, and frankly, we don't know what car invoices are. We have enumerated in the affidavit the specific records maintained by the company. The regulation directs the maintenance of customer invoices. He then concludes, "and any other records not specified above which contain the following information".

Now, your Honor, we are certainly entitled to an order which is not in the blanket terms of anything and everything that may contain information not specified in the foregoing. If the Court will examine the form of order which we have prepared, item 1 recites "all customer invoices covering new automobiles sold during the period specified." If the Court will compare that item 1 with the provision of the regulation to which I have just directed the Court's attention, the Court will see that in the documents designated and required to be kept by the regulation, namely, customer invoices, that information is required to be maintained, and any other designation of documents is not only not authorized [45] by the regulations, but is meaningless. For example, car invoices. We don't know what he is talking about, frankly. We are entitled to a specification. We are asked to turn over certain documents, and I believe it is incumbent upon the Court to designate so that we know with certainty and we run no risks of any

contempt proceedings or any other grounds for alleged noncompliance with the order.

The Court: Have you any objection as to (e) on the second sheet of petitioner's requested order form; that the words in parenthesis used originally be eliminated without prejudice to the petitioner's claim that that information as to those charges includes information as to undercoating, glazing, etc.?

Mr. Graham: No. It is my understanding, your Honor, that the regulation requires we maintain customer invoices on the sales of automobiles, and specified in the customer invoices shall be the information including that referred to in paragraph (e).

The Court: There is no danger of dispute on that item, then?

Mr. Graham: I think not, your Honor.

The Court: So far as undercoating and glazing are concerned.

Mr. Graham: I would like to call the Court's attention to the second item of my proposed order, with the [46] reservations I have previously indicated. I should say this, if the Court will read the original subpoena, administrative subpoena——

The Court: *Duces tecum*?

Mr. Graham: Yes.

The Court: It is attached to the first filing in this case?

Mr. Graham: Yes, it is at the bottom of the file.

The Court: It is attached to the first filing, namely, the motion for order requiring respondent to appear, testify and produce certain documents.

Mr. Graham: That is correct. The administrative subpoena attached thereto recites a request for records of new car sales and repair invoices. It is my contention, your Honor, and I think properly so, that there is no such requirement in the Act that any records of that character be maintained. The item 2 which I have placed in my order, I am satisfied we are not obligated to maintain by the Act. I maintain we are not called upon to produce those documents, but I recognize that the Court in its statement implied and directed that those documents be produced.

The Court: Item 1 in your order form is, according to your contention, a more accurate and correct description of the subject matter intended to be mentioned in what, if any, corresponding item in the order form requested by the [47] petitioner?

Mr. Graham: It covers everything from line 2 through line 18 of counsel's proposed order.

The Court: On the second page?

Mr. Graham: On the second page, yes, and the form in which I have proposed that, your Honor, is precisely the form called for by the regulation, and it is defined in the terms of the regulation in Section 10.

The Court: The printed copy of Report 107 which Mr. Graham handed to me includes a specification and specifications which are almost verbatim the same as those specifications stated in the petitioner's order form. Will you again call to the Court's attention in what particulars is there a divergence?

Mr. Graham: Let me read the order of the plaintiff. The plaintiff says that the inspection shall include customer invoices.

The Court: Where is that?

Mr. Graham: Line 2, page 2 of the plaintiff's order.

The Court: Customer invoices, and your order says "all customer invoices covering new automobiles". Do you feel that the words "customer invoices" might be contended later by the plaintiff to apply to automobiles other than new? [48]

Mr. Graham: They asked in the administrative subpoena, your Honor, for invoices relating to the sales of new automobiles, and that was what the Court ordered that there be produced. The thing that I object to most particularly is a catch-all or bucket phrase that we are to produce customer invoices, car invoices—which I state we don't know what he means—customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials, etc., and any other records not specified above which contain the following information. I maintain, and I think properly, that the Court cannot direct the production of a catch-all phrase, "and any other records not specified above which contain the following information". The regulations require that customer invoices contain that information, and that is the only document we are required to maintain by the regulations.

The Court: I would like to hear from petitioner's counsel as to what construction he puts on that additional phrase, "car invoices".

Mr. Frye: Your Honor, I don't like to embarrass counsel, but in Exhibit B to Mr. Bishop's affidavit, he submits a document called car invoice, and that is the current record which he now uses, and knowing their spirit of uncooperativeness, I did not want to designate a form by other than its exact title. [49]

Mr. Graham: May I clarify that? That is the present form of customer invoice presently in use by the respondent?

Mr. Knudsen: It is delineated in the body of the affidavit as a customer invoice.

The Court: What date was that filed?

Mr. Frye: It was filed last Friday, I believe.

The Court: Is it a four page affidavit, signed by Mr. Bishop under date of April 10 before Mr. Knudsen?

Mr. Graham: It is a document with several pages attached.

The Court: Then there is a different one signed by Mr. Bishop under date of April 10 with a great many of these forms.

Mr. Graham: That is correct.

The Court: You say there is something among those forms called a car invoice?

Mr. Frye: On Exhibit B. If he doesn't know what that is, it is the present, current record that is now in use. Prior to that time, your Honor, there was another document in use which is called a sales invoice, or just plain invoice. That document was in use under the old freeze order and the supplemental regulations thereto, and this most recent car invoice is what is required by Ceiling Price Regu-

lation 83 which has been in effect only since October, [50] so in order to make a complete examination and leave no doubt as to what records are required for that purpose, I have specified, using the names right on the exhibits furnished by the respondent, plus the specific requirements after October 15 which are contained in the regulation.

The Court: Is there anything else that Mr. Graham wishes to say?

Mr. Graham: Only this, your Honor: In addition to the substance of the regulation, which I think our proposed form nails down and spells out in terms of the regulation, I have provided in our proposed order a time of inspection. I think we are entitled to a delineation of a reasonable period of time.

The Court: In the petitioner's form of order, where is that subject dealt with? Lines 21-23?

Mr. Frye: We haven't specified a time, your Honor. There is no time specified in the plaintiff's order. They have had about three weeks to think about it, so I assume it will be forthwith.

The Court: I believe you meant during the day, and how long in the future they have to work?

Mr. Graham: That is correct, and when it may be the order that the inspection commence.

The Court: Notice near the bottom of page 1 of respondent's requested order. [51]

Mr. Graham: That is the last paragraph.

The Court: Do you in the fore part of the order say anything about the period of time from now until some date in the future when you would like

to exercise this privilege which you seek to obtain by the order?

Mr. Frye: No, your Honor, for two reasons: I don't know how long it will take cost accountants to go through all those records for nearly a year and a half; and furthermore, the regulations require in a blanket sort of way that they be kept and preserved now and for a period of two years hence, so I think any watering down of the power given to the agency in the regulation is not proper, especially to a period of one week. They have refused to comply with the requirements of the regulation which require that certain records be kept for inspection. It does not say to keep them for inspection for one week or ten days or anything of that sort, so I think the right to inspect them during reasonable business hours, etc., is proper, but without specific limitation, your Honor.

The Court: I prefer to state the privilege to be granted by this order in the affirmative rather than in the negative. You seem to have suggested it in the negative, Mr. Frye, and I would like to make appropriate changes in the language in lines 21-23 inclusive on the second page of plaintiff's order. "Shall be required at 3922"—is [52] that the correct address?

Mr. Frye: 3922 West Alaska Street, yes, your Honor.

The Court: Mr. Graham, do you believe that to be the correct address?

Mr. Graham: Yes, your Honor.

The Court: During the reasonable business hours of respondent. What else need be said?

Mr. Graham: Your Honor, I would like to have the effective date specified in order that I may have time to perfect an appeal to the Ninth Circuit Court.

The Court: Until the further order of this Court. What date does the plaintiff feel that it is imperative that this work begin?

Mr. Frye: I would agree to April 23, your Honor, beginning April 23 as counsel has suggested in his order.

The Court: Will counsel as to the plaintiff's requested form strike out the word "not" in line 22, following the word "shall" leave in effect the words "be required at", strike out the remaining words in that line, and strike out all of the words in line 23. After the word "shall", which is the last word left in line 22, insert these words, "the premises of respondent at 3922 West Alaska Street, Seattle, during the reasonable business hours of respondent". If there was sufficient space, I would wish to say, "commencing on April 23, 1952 and continuing until the further order of [53] this Court." I think it would be better to state a definite period. How long do you anticipate now, Mr. Frye, considering the facts stated in the affidavits and what you think would appear to be reasonable from the record now made, would be reasonably required to make this inspection?

Mr. Frye: Your Honor, it is difficult to state a definite period. As I tried to point out, the regulation requires that the records be kept and pre-

served for inspection even for a period going two years beyond the effective date of the regulation.

The Court: But so far as making this inspection by virtue of this order, not by virtue of a standing regulation, what is the limit of time which you think would be reasonable? Do you think one month would be reasonable?

Mr. Frye: I think one month might be rather short, your Honor.

The Court: Do you think until June 1 would be reasonable?

Mr. Frye: May we come back in and ask for an extension?

The Court: There is nothing in the order that says you cannot, and there is nothing in the order that says the respondent and petitioner may not come back next week and ask for a change in the order. I cannot prevent you from applying to the Court, nor am I disposed to so indicate the desire to do that. [54]

Mr. Frye: Until June 1, then, your Honor, I would agree to at this time, subject to further order of the Court.

The Court: Mr. Graham spoke of intending to seek a review by an appellate court of this order. Does that possibility have any bearing on the reasonableness of the time which the Court should now express?

Mr. Frye: I don't believe it does.

The Court: It is possible that the suggested initial period of time during which this order is to remain effective might expire during the pendency of the review before the appellate court.

Mr. Frye: That is correct. If we have a month and no interference, we will get the job done.

The Court: I ask counsel to insert in this order, after the word "respondent" which I have previously inserted in line 23, these words "commencing on April 23, 1952 and continuing until June 1, 1952".

The Court will not award any costs now. I will mark that out. The Court may in the future make some ruling on that subject, but I do not wish to do so now.

Let this order entitled order enforcing administrative subpoena, which was originally typewritten in the office of counsel for petitioner, but which order has been changed in certain respects by the Court's handwritten interlineation or striking by handwriting, be now entered. The Court [55] respectfully declines to use the order form suggested by counsel for respondent, because I think it is better to specify, as far as we know now, the specific material which the order is expected to reach.

Mr. Graham: If the Court please, may I ask that the Court determine a supersedeas bond and cost bond in the sum of \$250, and I would like to file the notice.

The Court: What information if any does the attorney for the respondent have upon that subject which he would like the Court to consider? I would like to know first if Mr. Graham for the respondent has anything further to state on that subject.

Mr. Graham: I would like to say this, your Honor, that the rules provide that upon the filing

of a notice of appeal, a cost and supersedeas bond may be approved. The customary cost bond is in the sum of \$250, and the supersedeas bond here—there is no judgment, if the order of the Court is sustained or is not sustained, there is no monetary damage so far as the petitioner is concerned, and it would appear that the statutory provision for the \$250 bond, which, as I understand, is customary on administrative orders, would be in order, and I would like to have the Court indicate an amount in order that that may be presented for filing.

The Court: Do you wish me to understand that you suggest the posting in this case of two bonds, one a cost [56] bond and the other supersedeas?

Mr. Graham: They can be united in one bond, your Honor.

The Court: You suggest that a \$250 cost bond is appropriate, and what do you suggest as an additional amount to operate as a supersedeas bond?

Mr. Graham: Obviously, no monetary measure can be imposed upon the administrative order involved here, so it simply should be a nominal amount, your Honor. \$250, a total bond of \$500, would certainly seem to me to be in order.

The Court: What information would plaintiff's counsel like the Court to consider?

Mr. Frye: Your Honor, if counsel means to have the supersedeas bond stay this order—

The Court: That is what he intends, as I understood him. As a matter of fact, I would suppose that is the primary purpose of the appeal.

Mr. Frye: Yes, your Honor. In that event, as

each day goes by the Government may lose part of its damage action. There is a statute of limitations of one year on this, and I think the bond should be greater in this case for that reason, your Honor.

The Court: How much would you estimate that damages for wrongful delay in furnishing this material might be?

Mr. Frye: It might well run to four or five thousand [57] dollars in a treble damages action. We can't compute it, of course, until we can get at the records. We can only estimate, your Honor.

The Court: What do you think of the fairness of the Court fixing some bond not less than the amount of what you feel now might be the accrued damages accruing during appeal which might operate to permit the defendant to wrongfully delay? What do you think of the feasibility and fairness of the Court fixing a bond today in what might be termed a minimum sum, with the privilege of counsel on both sides to later on show to the appellate court or, if it is appropriate, show to this Court that an additional supersedeas bond is required by the circumstances?

Mr. Frye: I would prefer to have more time to give it consideration, your Honor, subject to coming back.

The Court: The Court is considering advising the respondent that in case of appeal or undertaking to perfect review proceedings a supersedeas bond of \$4,000 be posted initially.

Mr. Graham: If the Court please, in view of the fact that it is necessary for me to leave the city

this afternoon, may I ask that there be fixed a time when I might present an order? It is an *ex parte* order, but I would like to have counsel advised in open court that I may present it.

The Court: Today? [58]

Mr. Graham: I would be prepared at 1:30.

The Court: Is that agreeable? Could you be here at 1:30?

Mr. Frye: I will be here at 1:30. I did not understand——

The Court: The Court now informally advises counsel in this case that if the respondent files some notice or other appropriate paper relating to initial steps of appeal——

Mr. Graham: The appeal has now been perfected. The notice of appeal has been filed with the clerk.

The Court: This notice having been effected, the Court advises counsel on both sides that the Court will require a \$4,000 supersedeas and cost bond, a bond to operate both as a supersedeas and cost bond in the total sum of \$4,000.

Mr. Graham: Yes, your Honor. I will hope to be able to have it prepared by 1:30. If not, I will advise the clerk to that effect and one of the other gentlemen in the office may handle the presentation, if that is agreeable to the Court.

The Court: Would it be just as well to have it at 2 o'clock?

Mr. Graham: Whatever the Court's convenience.

The Court: If 1:30 will accommodate you personally [59] in your program of having to leave the city——

Mr. Graham: I am not leaving until later, so 2 o'clock will be agreeable.

The Court: Two o'clock will be the hour instead of 1:30. I ask counsel on both sides to be present.

(Further proceedings at 2:00 p.m., April 16, 1952.)

Mr. Graham: I found in the period of time at my disposal and the necessity of arranging for collateral on this supersedeas bond, that it has been impossible to do so. The hearing at Richland which had been scheduled for the balance of the week has been cancelled by the Labor Board as of 11:30 this morning, so it would be possible for me to be back in court either tomorrow or Friday. I would ask leave to submit that bond for approval by the Court at some convenient time, and if I might advise the clerk when we have been able to complete financial arrangements—

The Court: Ten o'clock tomorrow morning or ten o'clock Monday morning.

Mr. Graham: Probably 10 o'clock tomorrow. Monday will be convenient, if it is agreeable with the Court.

The Court: The Court will make no appointment. It is not of such nature that the Court will make any order, except that the record will show what you have now said. The Court will make no order.

Mr. Frye: It would be more convenient for me Monday afternoon.

The Court: I cannot attend to it Monday afternoon.

(Further proceedings on April 21, 1952.)

The Court: Mr. Graham, will you come forward if you have an *ex parte* matter respecting this Westside Ford matter?

Mr. Graham: Under the terms of the statute, your Honor—as a matter of fact, there is no provision for furnishing notice, but I have furnished counsel with a copy of the cost and supersedeas bond, which is drafted in accordance with the provisions of rule 73(d). I have that here for the Court's inspection.

The Court: Did you orally advise counsel when you were going to present the matter.

Mr. Graham: Yes. Counsel is here in court, your Honor.

The Court: I will hear any objections, if there are any.

Mr. Holbrook: May it please the Court, the Government objects to the form as offered by the defendant of the supersedeas bond in this matter. The problem arising in this bond——[61]

The Court: If you are not agreed on it, I will have to let the matter go to the end of the calendar.

The Court: If counsel in the Westside Ford matter will come forward, I believe we can dispose of it. I wish you in further discussion to have in mind that any supersedeas bond can be changed during the pendency of the appeal, either by the Appellate Court, or, possibly, I do not know, I have not looked at the law as to whether this Court can, but if counsel desire to try to convince the Court that the bond should be greater or less at some time pending appeal, the Court could, I think, rule in accordance

with the Court's judgment in the matter after hearing counsel. Do you have that in mind in presenting your objections now?

Mr. Holbrook: Yes, your Honor. I understand at the present time that the Government's approval is not necessary to the bond. A stipulation for the approval of the bond as submitted to the Court for the Court's approval does not end the further relief granted to the Government regarding the supersedeas appeal bond that we have here.

The objection at the present time directed to the bond is directed to the language of the rule that provides for the bond, and it is admitted that the language of the bond follows generally the language of the rule. The Court [62] considered it at the time of the setting of the amount of the bond, the unusual problem that is confronted by the Government in this instance, so therefore it is considered not necessary to call to the Court's attention that the general language of the rule, in my opinion, does not fit the specific problems that can arise in the instant case.

I also call to the Court's attention the necessity for a correction of punctuation in line 2 on the second page of the bond itself. "Now, therefore, if the terms of said order shall be satisfied and complied with together with costs," and the bond reads "interest and damages for delay". I suggest that following the language of the rule, that interest should be followed by a comma, and then the wording, "and damages for delay".

Mr. Graham: I want to check the rule. The rule does carry the comma after the word interest, and it

would be appropriate that a comma be inserted after the word interest.

The Court: You may do that. Counsel will have in mind what the Court previously said, that if either side during this appeal feels that this bond is either inadequate or excessive, some court will hear you in respect to that matter.

Mr. Holbrook: Yes, your Honor, I understand that, and with that thought in mind for the record at this time [63] the grounds for the objection of the Government have been stated.

The Court: Let this cost bond and supersedeas bond on appeal be now filed in this case, it having been already approved by this Court, and together therewith let the certified copy of the power of attorney of the attorney in fact executing the bond on behalf of the surety be filed.

[Endorsed]: Filed May 15, 1952.

[Endorsed]: No. 13392. United States Court of Appeals for the Ninth Circuit. Westside Ford, Inc., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 22, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the Circuit Court of Appeals
for the Ninth Circuit

No. 13392

WESTSIDE FORD, INC., a corporation,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

APPLICATION FOR APPROVAL
OF STIPULATION

Comes now Westside Ford, Inc., Appellant in the above-entitled cause and requests that this Honorable Court approve the stipulation in this cause attached hereto and made a part hereof as fully as if set forth herein.

BOGLE, BOGLE & GATES,
/s/ By ROBERT W. GRAHAM,
Attorneys for Appellant.

The above application for approval of the attached stipulation is hereby granted.

Done in Open Court this sixteenth day of May,
1952.

/s/ WILLIAM DENMAN,
Circuit Judge,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals
for the Ninth Circuit.

STIPULATION CONCERNING TRANSMITTAL OF EXHIBITS ON APPEAL

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled cause, by their respective attorneys, as follows:

That, subject to the approval of the United States Court of Appeals for the Ninth Circuit, Exhibits A, B, C, D, E, F, G, H, I, J and K attached to and incorporated as a part of an affidavit of William L. Bishop dated April 10, 1952 and to be designated as part of the record on the appeal of the above-entitled cause shall be presented to said Court for consideration in said appeal in their original form and without being printed in the record on appeal.

Dated at Seattle, Washington, this fifteenth day of May, 1952.

/s/ BOGLE, BOGLE & GATES

/s/ By ROBERT W. GRAHAM,
Attorneys for Appellant.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FREDERIC P. HOLBROOK,
Special Assistant United
States Attorney,

/s/ HOWARD F. FRYE,
Trial Attorney,
Attorneys for Appellee.

[Endorsed]: Filed May 26, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Comes now Westside Ford, Inc., Appellant in the above-entitled cause, and states that on its appeal herein it will rely upon the following points:

The District Court erred in overruling Appellant's objections and answer to motion for order requiring respondent to appear, testify and produce certain documents and in entering the order enforcing administrative subpoena, of April 16, 1952, because:

(A) The administrative subpoena duces tecum issued March 25, 1952, was invalid when issued because the Seattle District Enforcement Director of the Office of Price Stabilization did not define the scope and purpose of the investigation, inspection or inquiry to be made before issuing said subpoena, as is required by:

(1) Section 705(a) of the Defense Production Act of 1950, as amended:

(2) Enforcement Procedure Regulation 2 of the Office of Price Stabilization;

(3) Delegation of Authority 4, Supplement 1, as revised, of the Office of Price Stabilization.

(B) The administrative subpoena duces tecum issued March 25, 1952, was invalid when issued because the Seattle District Enforcement Director of the Office of Price Stabilization did not define the scope and purpose of the investigation, inspection or inquiry to be made to Appellant at or before the

time of service of said subpoena, nor was Appellant advised of or served with any such definition of scope and purpose at or prior to service of said subpoena, all as is required by:

(1) Section 705(a) of the Defense Production Act of 1950, as amended;

(2) Enforcement Procedure Regulation 2 of the Office of Price Stabilization;

(3) Delegation of Authority 4, Supplement 4, as revised, of the Office of Price Stabilization.

(C) The administrative subpoena duces tecum issued March 25, 1952, was invalid when issued because Appellee did not serve upon Appellant an Inspection Authorization prior to the issuance of said subpoena in accordance with Enforcement Procedure Regulation 1 of the Office of Price Stabilization and in accordance with Section 705(a) of the Defense Production Act as amended.

(D) The District Court order enforcing administrative subpoena of April 16, 1952, authorizes the inspection of documents completely immaterial and irrelevant to any possible proper investigation, inspection or inquiry to be made.

(E) The administrative subpoena duces tecum issued March 25, 1952, was invalid when issued because it was so vague in its requirements that it amounted to an attempted unreasonable search and seizure within the prohibition of the Fourth Amendment and lack of due process under the Fifth Amendment to the Constitution of the United States.

(F) The administrative subpoena duces tecum is-

sued March 25, 1952, was invalid when issued because it was so vague and uncertain in its requirements as to be incapable of enforcement at law.

(G) The District Court order enforcing administrative subpoena, of April 16, 1952, is so vague and uncertain in its requirements that it authorizes an unreasonable search and seizure within the prohibition of the Fourth Amendment and lack of due process within the prohibition of the Fifth Amendment to the Constitution of the United States.

(H) The District Court order enforcing administrative subpoena, of April 16, 1952, fails to designate the documents of which inspection is authorized with that degree of reasonable certainty required by law.

(I) The District Court order enforcing administrative subpoena, of April 16, 1952, denies Appellant the due process of law required by the Fifth Amendment to the Constitution of the United States by authorizing on-premises inspection of documents after Appellant was required to defend a motion for off-premises production of documents.

(J) The terms of the District Court order enforcing administrative subpoena, of April 16, 1952, exceeded the scope of the pleadings, prayer and evidence before the District Court.

(K) That part of the District Court order enforcing administrative subpoena, of April 16, 1952, which authorizes Appellee to photograph Appellant's records is not authorized by the Defense Production Act of 1950, as amended, or any other law.

(L)) The District Court order enforcing administrative subpoena, of April 16, 1952, authorizes the

undue, unreasonable and unlawful harassment of Appellant by Appellee.

(M) The cumulative effect of the administrative improprieties stated above is such that the District Court committed reversible error in granting its order enforcing administrative subpoena, of April 16, 1952.

/s/ BOGLE, BOGLE & GATES and
/s/ ROBERT W. GRAHAM,
/s/ J. KENNETH BRODY,
/s/ C. CALVERT KNUDSEN,
Attorneys for Appellant.

[Endorsed]: Filed June 5, 1952. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF MATERIAL PORTIONS
OF RECORD TO BE PRINTED

Comes now Westside Ford, Inc., Appellant in the above entitled cause, and hereby designates the following portions of the record on appeal which are material to the consideration of this appeal and requests that the same be printed:

(1) Motion for Order Requiring Respondent to Appear, Testify and Produce Certain Documents, together with Exhibit A attached to and a part of said Motion.

(2) Affidavit of Harold F. Nelson, dated April 3, 1952.

(3) Affidavit of Philip E. Hartwick, dated April 3, 1952.

(4) Affidavit of John H. Binns, dated April 3, 1952.

(5) Affidavit of John P. Colman, dated April 3, 1952.

(6) Objections and Answer to Motion for Order Requiring Respondent to Appear, Testify, and Produce Certain Documents.

(7) Affidavit of William L. Bishop (6 pages), dated April 10, 1952, but omitting Exhibits A, B, C, D, E, F, G, H, I, J and K thereto.

(8) Second Affidavit of William L. Bishop (4 pages), dated April 10, 1952.

(9) Affidavit of Ralph E. Malone, dated April 10, 1952.

(10) Affidavit of Robert W. Graham, dated April 10, 1952.

(11) Affidavit of C. Calvert Knudsen, dated April 10, 1952.

(12) Affidavit of John H. Binns, dated April 14, 1952, together with Exhibit 1 attached to and a part of said Affidavit.

(13) Affidavit of William L. Bishop, dated April 14, 1952.

(14) Following portions of the Transcript of Proceedings on Hearing on Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and Produce Certain Documents:

(a) Lines 1 through 7, page 2; (b) lines 7 through 14, page 4; (c) line 2, page 6, through line 15, page 8; (d) line 25, page 9, through line 4, page 10; (e)

line 23, page 25, through line 24, page 28; (f) line 11, page 30, through line 5, page 31; (g) line 17, page 36, through line 9, page 37; (h) lines 13 through 17, page 39.

(15) Order Enforcing Administrative Subpena, dated April 16, 1952.

(16) Notice of Appeal by Respondent Westside Ford, Inc., dated April 16, 1952.

(17) Cost Bond on Appeal and Supersedeas Bond, dated April 21, 1952.

(18) Statement of Points on Which Appellant Intends to Rely, filed herewith.

/s/ BOGLE, BOGLE & GATES and

/s/ ROBT. W. GRAHAM,

/s/ J. KENNETH BRODY,

/s C. CALVERT KNUDSEN,

Attorneys for Appellant

[Endorsed]: Filed June 5, 1952. Paul P. O'Brien, Clerk.



[Title of U. S. Court of Appeals and Cause]

DESIGNATION OF ADDITIONAL MATERIAL PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the United States of America, Plaintiff-Appellee, hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit the following portions of the record, proceedings and evidence in this

action in addition to that portion designated by the Defendant-Appellant and requests that the same be printed:

(1) The complete and entire stenographically reported transcript of the evidence and proceedings on Hearing on Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and Produce Certain Documents.

(2) Designation of the Portions of Record to be Printed filed by Defendant-Appellant, Westside Ford, Inc.

(3) This designation.

Dated this eleventh day of June, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FREDERIC P. HOLBROOK,
Special Assistant U. S. Attorney,

/s/ HOWARD F. FRYE,
Trial Attorney,
Office of Price Stabilization.

[Endorsed]: Filed June 13, 1952. Paul P. O'Brien, Clerk.

No. 13392

In the
**UNITED STATES
COURT OF APPEALS**
for the Ninth Circuit

WESTSIDE FORD, INC., a corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM ORDER ENFORCING ADMINISTRATIVE
SUBPOENA

BRIEF FOR APPELLANT

BOGLE, BOGLE & GATES

ROBERT W. GRAHAM

J. KENNETH BRODY

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Attorneys for Appellant.

Central Building
Seattle 4, Washington

FILED

OCT 15 1952



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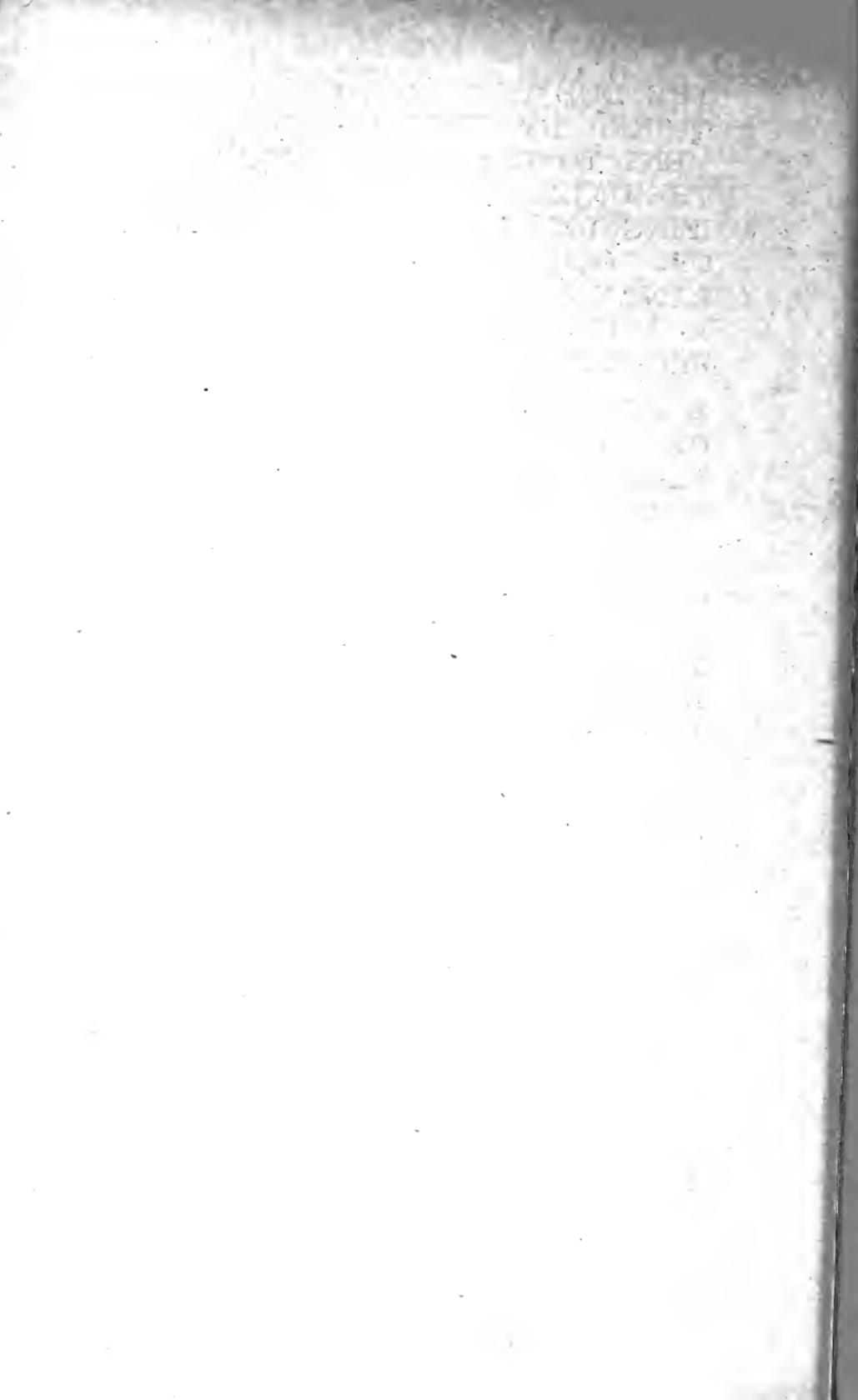


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In the
UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

WESTSIDE FORD, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM ORDER ENFORCING ADMINISTRATIVE
SUBPOENA

BRIEF FOR APPELLANT

I. STATEMENT OF THE CASE

Subsequent to the issuance by appellee of an administrative subpoena *duces tecum* (Tr. 5) pursuant to the provisions of Section 705(a) of the Defense Production Act as amended, 50 App. USCA § 2155(a), 64 Stat. 816, 65 Stat. 139, appellee filed a motion in the District Court for the Western District of Washington under Section 705(a) of said

Act for an order requiring appellant, through its President, to appear, testify and produce documents (Tr. 3). Appellant filed objections and answer to the said motion (Tr. 13) and on April 16, 1952, the District Court entered its Order Enforcing Administrative Subpoena (Tr. 35); from which appeal is taken to this Court.

Appellant is engaged in the sale of new automobiles. Inquiry as to appellant's pricing practices was first made by O.P.S. Agent Freeze on April 26, 1951, and fully answered (Tr. 22). Further investigation was made by O.P.S. Agent Hartwick during June, 1951, at which time appellant furnished the said agent copies of the base period (December 19, 1950, to January 26, 1951) price schedule, items included in appellant's ceiling prices, and invoices for inspection (Tr. 22).

Further information was supplied at the request of one Nelson on July 24, 1951 (Tr. 23).

On March 11, 1951, O.P.S. Agents Colman and Apstein requested examination of appellant's records regarding base period prices and new car prices following the base period. Appellant furnished said agents office space together with free and complete access to any and all records and invoices requested by them concerning sales and service of new automobiles during the calendar years 1950, 1951 and 1952 (Tr. 23). This investigation continued for a period of ten days (Tr. 12, 23).

Appellee then demanded permission, on or about March 25, 1952, to remove and microfilm or photostat all of appellant's records pertaining to sales of new automobiles for a period of fifteen months (Tr. 8, 24). This question was referred to counsel for appellant (Tr. 8, 24).

At no time did appellant or any employee of appellant refuse any agent or employee of the O.P.S. access to its premises or records (Tr. 24).

Appellee's request to microfilm or photostat appellant's records was declined by counsel for appellant and said refusal was in direct response to this specific request and not in response to any request for inspection of premises or records (Tr. 26). Appellee's subpoena *duces tecum* was thereupon issued on April 26, 1952 (Tr. 5), which appellant declined to obey. Further proceedings were had as set forth above.

Appellee's motion for enforcement (Tr. 3) was supported only by the affidavits of Nelson (Tr. 8), Hartwick (Tr. 9), Binns (Tr. 10), and Colman (Tr. 12). At no time was any Inspection Authorization served upon appellant (Tr. 24). At no time was any determination of scope or purpose served upon appellant other than the purported determination of scope and purpose contained in and attached to the affidavit of Binns served upon counsel for appellant on the day of hearing of the motion for enforcement (Tr. 28).

Appellant urges error in the issuance of the Order Enforcing Administrative Subpoena (Tr. 35).

II. QUESTIONS PRESENTED

1. Was the administrative subpoena *duces tecum* issued March 26, 1952, invalid because

- (a) There was a failure to define the scope and purpose of the inspection, investigation or inquiry to be made,
- (b) There was a failure to advise or serve upon appellant any such definition of scope and purpose,
- (c) There was a failure to serve upon appellant an Inspection Authorization prior to the service of said subpoena?

2. Was either the administrative subpoena *duces tecum* issued March 26, 1952, or the Order Enforcing Administrative Subpoena entered April 16, 1952, improper because

- (a) It authorized the inspection of documents immaterial and irrelevant to this or any proper investigation, inspection or inquiry to be made,
- (b) It was so vague in its requirements as to be an attempted unreasonable search and seizure prohibited by the Fourth Amendment,
- (c) It was too vague and uncertain in its requirements to be capable of enforcement or did

not designate documents authorized to be inspected with that degree of certainty required by law?

3. Was the District Court Order Enforcing Administrative Subpoena entered April 16, 1952, or any part thereof, invalid because

- (a) It exceeded the scope of the pleadings, prayer and record before the court,
- (b) It authorized the photographing of appellant's records,
- (c) It constituted an unreasonable and unlawful harassment of appellant?

4. Did the District Court Order Enforcing Administrative Subpoena, of April 16, 1952, deny appellant the due process of law required by the Fifth Amendment by authorizing on-premises inspection after appellant was required to defend a motion for off-premises production of documents?

5. Was the cumulative effect of administrative improprieties above stated such as to render the District Court's Order Enforcing Administrative Subpoena erroneous?

III. SUMMARY OF ARGUMENT

The court below not only granted enforcement of an administrative subpoena invalid when issued, but also entered an enforcement order infringing

upon the constitutional and legal rights of appellant and sanctioning oppressive and illegal action by an administrative agency.

The subpoena was invalid when issued because the administrative agency had not complied with the prerequisites established by statute and by the procedural regulations and delegations of authority issued by the agency itself. No definition of scope and purpose was made by the responsible administrative official, nor was any such definition served upon or communicated to appellant. Further, the pattern of enforcement established by statute and recognized by regulation was not followed by the agency in that the subpoena was not preceded by an inspection authorization.

An issue of the materiality and relevancy of information sought is always before the court in a proceeding to enforce an administrative subpoena. Since the scope and purpose of this investigation were not defined, that issue could not have been resolved by the court below. Notwithstanding this, the enforcement order grants access to information completely irrelevant even to appellee's alleged purpose of the investigation.

Both the subpoena and the enforcement order are so broad in scope and vague in terms that they violate the constitutional prohibitions against unreasonable searches and seizures, and both fail to spe-

cify the documents sought with reasonable particularity as is required by law.

Contrary to the provisions of the Emergency Price Control Act of 1942, the Defense Production Act of 1950 does not authorize the copying of records. Thus the court below erred in permitting the photostating or copying of records inspected.

The entire proceeding below, administrative and judicial, is marked by abuse of discretion and administrative oppression. In granting an order permitting on-premises inspection in response to an application for off-premises production the court invaded the province of the executive department of the government, ignored the "fair play" requisites of procedural due process, and exceeded the scope of the prayer and record before it. Unreasonable harassment of a private citizen by a government agency is sanctioned by the enforcement order; both law and sound policy dictate that the cumulative effect of such administrative improprieties is to require a reversal of the enforcement order granted by the court below.

IV. ARGUMENT

A. THE ADMINISTRATIVE SUBPOENA WAS NOT ISSUED IN CONFORMITY WITH THE REQUIREMENTS OF THE DEFENSE PRODUCTION ACT AND APPLICABLE REGULATIONS THEREUNDER.

1. The Administrative Subpoena Was Invalid When Issued for Failure to Serve an Inspection Authorization on Appellant Prior Thereto.

50 App. USCA 2155(a) has been amplified by regulations EP-1, 16 F.R. 2496 and EP-2, 16 F.R. 2496. The statute, together with these regulations, discloses a comprehensive pattern or scheme for obtaining information and documents under the Defense Production Act of 1950, as amended.

Under the statute, the President may "by regulation, subpoena, or otherwise" obtain information. In so doing, he may "make such inspection of the books, records and other writings, premises or property of * * * any person as may be necessary or appropriate in his discretion, to the enforcement or the administration of this Act * * *"

The intent of the statute is reflected in the regulations. EP-1 provides for an "inspection authorization" requiring any person to permit the duly authorized representative of the O.P.S. to inspect books, records and other writings in his possession and control at the place where such person keeps them, and to inspect the premises and property of the person.

In the event that the inspection authorization is not honored, the O.P.S. may then have recourse to the subpoena procedure described in EP-2. It would be of little use to resort to subpoena in a case where

the information might have been obtained by means of an inspection authorization. It would be unduly burdensome on the witness to be forced to appear and produce records when the records might be more easily inspected at the witness' place of business.

Bowles v. Sachnoff (D.C.W.D. Pa. 1946), 65 F. Supp. 538, dealt with the admissability of evidence obtained over objection to an investigation authorization. The court said:

“However, if the person governed by any order or regulation of the Office of Price Administration does not voluntarily consent, or refuses to comply with the request to make available the records in connection with his business for the purpose of inspection, that said investigator, under said circumstances, has no right or authority to examine or investigate the records. If any information is secured under the circumstances just mentioned which gives rise to any claim or prosecution, in my opinion, said evidence would be subject to a motion to suppress since it would amount to the person concerned being required to waive his constitutional immunities against self-incrimination. This is true since a subpoena duces tecum was not issued.

“If the circumstances just stated arise, the Office of Price Administration has ample authority existing to issue a subpoena duces tecum to compel the person concerned to produce or make available for inspection the records in question.”

From this it appears that the court recognized the logic of resorting to subpoena only after a refusal to comply with the investigation authorization. That the O.P.S. also recognizes this pattern is indicated

by *In re Bleichfeld Bag & Burlap Co.* (D.C.W.D.N.Y., 1952) 105 F. Supp. 162 where an inspection authorization containing on its face a determination of scope and purpose, was served prior to the subpoena.

Appellee has nowhere shown that any inspection authorization was issued. It should be noted, as set out in the affidavit of William Bishop (Tr. 21), that agents of the O.P.S. were granted access to appellant's books and records at appellant's place of business from time to time, and at one instance over a period of ten days. There is no indication that appellant would have declined reasonable inspection under an appropriate authorization. Appellant submits that appellee's subpoena and application for an enforcement order were premature in view of appellee's failure first to attempt to obtain the required data by means of an inspection authorization.

2. The Administrative Subpoena Was Invalid for Failure to Define the Scope and Purpose of the Investigation as Required by Law; And for Failure to Inform Appellant of the Scope and Purpose of the Investigation.

a. Scope and purpose must be defined.

The importance of a definition of the scope and purpose of the investigation to be aided by resort to subpoena is made clear by the emphasis upon this point in the statute and regulations.

50 App. USCA 2155(a) makes this requirement:

“The President shall issue regulations insuring that the authority of this subsection will be utilized only after the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority * * *”

EP-1, 16 F.R. 2496, previously referred to, requires as a prerequisite to validity that:

“Inspection authorizations shall specify the person to be served, the title or official position of such person, the evidence sought to be adduced, its general relevancy, and the scope and purpose of the investigation, inspection or inquiry to be made.”

Similarly, EP-2, 16 F.R. 2496 contains this requirement:

“Subpenas shall be issued only after the scope and purpose of the investigation, inspection or inquiry to be made have been defined by the Assistant Director of Price Stabilization for Enforcement (Director of Enforcement), Regional Enforcement Director or District Enforcement Director of the Office of Price Stabilization having jurisdiction over such investigation, inspection, or inquiry * * *”

Finally, a determination of scope and purpose is required by Delegation of Authority 4, Supplement 1, 16 F.R. 4359, which states that the District Enforcement office has the power:

“To sign and issue Subpenas requiring any person to appear and testify or to appear and produce documents, or both, at any designated place.”

But the delegation of authority is conditional.

“Such Subpenas, Inspection Authorizations, and Request Letters will be utilized only after the scope and purpose of the investigation, in-

spection or inquiry to be made have been defined by * * * the District Enforcement Director * * * in whose area as above defined such investigation, inspection or inquiry is to take place.”

b. No adequate definition of scope and purpose was made by the District Enforcement Director.

In the light of the preoccupation of both statute and regulations with adequate definition of the scope and purpose of the investigation, we may now consider the subpoena actually served by appellee, and appellee's purported compliance with these requirements.

The subpoena (Tr. 5-6) requires appellant to appear and “to give testimony concerning SR 5 to GCPR and CPR 83 * * *” and further to produce for inspection “Records and invoices relative to all sales of new automobiles sold from December 19, 1950, to present date, including records of service performed on said automobiles.”

This subpoena was served upon appellant on March 26, 1952. It was accompanied by no definition of scope or purpose of the inquiry.

On April 3, 1952, there was served and filed the affidavit of John H. Binns, District Enforcement Director (Tr. 10-11), which states that “affiant deemed it necessary and appropriate to the enforcement of the Defense Production Act of 1950, as amended * * *” to take testimony and obtain information from appellant's president.

The hearing on the Motion For Order Requiring Respondent to Appear, Testify and Produce Certain Documents was set for April 14, 1952. It was only on the day of this hearing that respondent served upon counsel for appellant the supplemental affidavit of Binns (Tr. 28-30) with its purported determination of purpose and scope attached thereto (Tr. 31-33).

What was that determination of purpose and scope contained in and attached to this affidavit? The purpose and scope was purportedly to determine whether appellant had been complying with Para. 3 of SR 5 to GCPR, 16 F.R. 1769, and CPR 83, 16 F.R. 10594. There follows an absolutely unlimited authority to inspect any documents required to be kept by the Defense Production Act of 1950, interview any person or persons who have "or are believed to have relative or pertinent information," inspect premises and property and make "Such other or further investigation, inspection, or inquiry as the district enforcement director may, in the exercise of his discretion, deem necessary or appropriate."

Does such a history show a compliance with either the letter or the spirit of the statute and regulations?

Binns' affidavit dated April 3, 1952 (Tr. 10-11) in which he deemed it "necessary and appropriate" to take testimony is certainly no definition of scope and purpose. If it be admitted that the investigation

is both necessary and appropriate, such a finding does not indicate either the purpose or the scope thereof.

Respondent must therefore rely on the affidavit of Binns dated April 14, 1952 (Tr. 28-30) and its attached determination (Tr. 31-33) to show that there has been an adequate determination of scope and purpose.

It is true that the determination of April 14 particularizes SR 5 by referring to paragraph 3 thereof; while the subpoena had made a blanket reference to SR 5. However, reference to SR 5 will show that paragraph 3 contains all pricing provisions relating both to new automobiles, extra, special, or optional equipment and all other charges in connection therewith. The other paragraphs relate to used cars or contain definitional or administrative provisions.

What, then, is the scope and purpose of the investigation if appellee's determination is to be relied upon? The scope is nothing less than all transactions relating to new cars in which appellant, a new car dealer, engaged, and the purpose is to determine if appellant has violated any applicable price stabilization rule or regulation. The effort is thereupon made to subpoena *all* records of appellant, inspect all property, and take any testimony deemed necessary by the District Enforcement Director.

Appellee has, in actuality, evaded the very purpose and meaning of the statute and regulations by

incorporating in his determination of scope and purpose all pricing regulations under which appellant was doing business. He has in effect said, "I will investigate all of your records to see if you are violating any price ceiling." As to appellant, the definition was as broad as the statute.

A study of CPR 83 will illustrate the complexity of automobile price ceilings. A method was set out for pricing new cars, optional equipment and new products. The following are elements which were included in ceiling prices: Transportation charges, taxes, delivery and handling, other base period charges, installation charges. Methods were provided for determination of ceilings on these items. CPR 83 further contained prohibitions against price-related policies, including: requirement of time payments or financing; requirement of purchase of optional equipment; requirement of trade-in; grant of less than reasonable allowance for trade-in; rental or lease agreement with option to purchase totaling more than ceiling price; increase in financing charges to evade ceiling price.

Let us assume that the appellee has reason to believe a dealer is in violation of ceiling price regulations for delivery and handling charge. It would then be proper for appellee to determine the purpose to be the investigation of the delivery and handling charge of that dealer. The scope would be particularized by a listing of those documents reasonably

necessary to determine if the ceiling price for handling and delivery were being violated.

To summon appellant to testify and produce documents relating to blanket provisions governing his entire principal business is to evade the whole meaning of the statutory requirement of determination of scope and purpose.

The question may be raised how appellee can possibly determine what documents are vital to the scope of his investigation, purpose having been determined, if it is not familiar with the business, records, and files of the parties investigated. But this argument is of no avail to appellee. The testimony is uncontroverted, as set forth in the affidavit of Bishop (Tr. 23), that agents of appellee, for a period of ten days after March 11, 1952, were given full and free access to any and all records and documents requested and were furnished office space to aid in their investigation.

It was only when these agents demanded permission to remove and photostat all its records that appellant sought the advice of counsel.

Thus, appellee should have been amply informed, not only of the nature of appellant's records, but also of any particular type of alleged violation which it sought to investigate. Appellee has failed or refused to define the scope and purpose of its investigation and its administrative subpoena—a failure or refusal which was plainly within its power

to correct and which is equally plainly violative of the statutory mandate that such be done.

c. Appellant was not timely advised of or served with any definition of scope and purpose.

The manner and time of service of the affidavit of Binns with its attached purported definition of scope and purpose is of vital interest. As previously noted, it was served upon counsel at the date of hearing. Of what use is a determination of scope and purpose if it remains in the files of appellant? A principal purpose should be to advise the party subpoenaed, so that he may know the scope and purpose of the investigation and, hence, the testimony and documents required in response thereto. Appellant at no time during these proceedings knew, nor does appellant today know, the actual purpose of this investigation.

That the O.P.S. recognizes the necessity of informing the party of the scope and purpose of the investigation is illustrated by the requirement of EP-1 at Section 3 that:

“Inspection Authorizations shall specify the person to be served, the title or official position of such person, the evidence sought to be adduced, its general relevancy, and the scope and purpose of the investigation, inspection or inquiry to be made.”

Section 4 of EP-1 further requires service of the inspection authorization upon the party.

The standards required of an inspection authori-

zation must be equally applicable to the subpoena process.

B. THE ADMINISTRATIVE SUBPOENA AND ENFORCEMENT ORDER VIOLATE CONSTITUTIONAL AND LEGAL REQUIREMENTS OF MATERIALITY, RELEVANCY AND PARTICULARITY OF DESCRIPTION.

1. The Enforcement Order Authorizes the Inspection of Documents Immaterial and Irrelevant to This or Any Other Possible Proper Investigation.

- a. There can be no determination of materiality or relevancy in the absence of a determination of scope and purpose.*

The importance of a determination of scope and purpose is made clear when one considers the problem of the extent to which inspection or production of documents may be allowed. The relevancy and materiality of the information sought can only be determined with reference to the scope and purpose of the investigation.

It has always been held that, on application for enforcement of a subpoena, the issues of relevance and materiality of information sought are factual issues to be determined by the court. In the leading case of *Hale v. Henkel*, 201 U.S. 43, 50 L. ed. 652, 666, the Supreme Court said:

“Doubtless many, if not all, of these documents may ultimately be required, but some

necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers.”

Bowles v. Beatrice Creamery Co. (D.C. D. Wyo., 1944), 56 F. Supp. 805, involved an inspection authorization rather than a subpoena, but the principle is applicable also to a subpoena. The court said:

“The point to be accentuated would be that the rights of the government go only to such documents as are relevant to the matter under investigation and that disclosure thereof cannot be compelled without some showing of the relevancy.”

The decision was reversed on other grounds in *Bowles v. Beatrice Creamery Co.* (C.A. 10, 1944), 146 F.(2d) 774. But the court stated:

“There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason imposes in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto.”

In *Provenzano v. Porter* (C.A. 9, 1946), 159 F.

(2d) 47, there was a subpoena and an order enforcing, which was affirmed. The court made an express finding of the relevance and materiality of the information sought:

“Their probable materiality in such an inquiry appears both on the face of the subpoena and from the allegations of the petition.”

Goodyear Tire & Rubber Co. v. N.L.R.B. (C.A. 6, 1941), 122 F.(2d) 450, 136 A.L.R. 883, was a case involving a subpoena *duces tecum* issued by the National Labor Relations Board pursuant to section 11(1) of the National Labor Relations Act, 29 U.S.C.A. 151 *et seq.* A large mass of records was sought by subpoena *duces tecum*. The circuit court found that there was a serious question as to the relevance of a certain card index to the purposes of the investigation. It, therefore, refused to affirm the enforcement order with regard to the card index and remanded the proceeding to the district court for further proceedings. The court stated that the issue of relevance is always open to contention; that the contention raises an issue of fact to be determined by the court. This is, therefore, a flat holding that relevance and materiality are not, as contended by appellee, left to the sole discretion of the administrative agency.

The *Goodyear* case is of especial significance because it is adopted by the court in *Bowles v. Cherokee Textile Mills* (D.C.E.D. Tenn. 1945), 61 F. Supp.

584, as the basis for a parallel decision under the Emergency Price Control Act of 1942. This was an action brought to enforce a subpoena *duces tecum* issued by the Price Administrator. The contention was squarely made by the Administrator:

“* * * that once he has determined administratively that the matter called for in the subpoena is material to the subject under consideration, and has caused the subpoena to issue, that the court has power to enforce compliance, but has no jurisdiction to review the soundness of the administrative determination of materiality. In other words, that his broad powers to investigate, looking to the fixing of prices, gives him also the exclusive right to determine finally whether the contents of the record, paper or document called for is material; that the statute so provides.”

The court disposed of the issue by reference to the *Goodyear* case, stating:

“It is my opinion, after considering the cases cited by counsel which bear upon the question, that it was squarely before the Circuit Court of Appeals for the Sixth Circuit in *Goodyear Tire & Rubber Co. v. National Labor Relations Board*, 122 F.(2d) 450, at page 453, 136 A.L.R. 883, in which the court said, in part: ‘The statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus confided to the discretion of the District Court, which is to be judicially exercised. We think that the review in this case extends no further than the determination as to whether or not there was an abuse of its discretion. Applying this rule, we think that it was open to the company to contend that the documents called for do not relate to the particular matter in ques-

tion; that this contention made in the answer raises an issue of fact for determination by the court, and if determined in its favor, that the application of the Board as to documents found not so to relate should be dismissed upon the merits.' ”

The conclusion of the court was as follows:

“* * * My conclusion is that the court has jurisdiction to determine the question whether the matter called for in the subpoena is material to the determination the administrator is authorized to make, but before the aid sought by the administrator will be granted, it must appear from evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation.

“I think this action will dispose of the motion to strike portions of the answer, since the narrow question is whether the administrator is given sole authority to determine relevancy and materiality. I do not think the Congress so intended.”

This review of the cases makes it clear that there is always before the court the issue of materiality and relevancy; and that this issue may not be foreclosed by an administrative officer.

But the Order Enforcing Administrative Subpoena (Tr. 35) is supported by no finding of materiality and relevancy of information sought; and such could not be possible where there has been a failure to determine the scope and purpose of the investigation.

b. The enforcement order authorizes the inspection

of documents irrelevant and immaterial to any inquiry under SR 5 to GCPR and CPR 83.

In addition, the court below ordered the inspection of documents completely irrelevant and immaterial even under the terms of the invalid definition of scope and purpose made by the O.P.S. Those are the following documents, in the words of the Order (Tr. 36) :

“* * * the following designated new car records for the period December 19, 1950, to the present date which are in his possession, custody, or control: * * * repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery, * * *”

Since the terms of the definition of scope and purpose asserted by the District Director relate to “Para. 3 of SR 5 of GCPR and CPR 83” (Tr. 29), we must look to those regulations to determine relevancy and materiality.

Paragraph 3 of SR 5 to GCPR provided in substance that the ceiling price on new automobiles was the sum of the following items:

- (a) the manufacturer’s suggested list price for the automobile in effect on January 26, 1951,
- (b) the manufacturer’s suggested list price for extra, special or optional equipment plus the dealer’s ceiling price for installation under GCPR,
- (c) transportation costs,
- (d) Federal excise taxes charged the dealer,

- (e) state and local taxes imposed upon the dealer,
- (f) the dealer's ceiling price under GCPR for preparing and conditioning the new automobile for delivery,
- (g) the dealer's ceiling price under GCPR for any other services performed,
- (h) increases in the manufacturer's price to the dealer occurring since March 1, 1951, plus a percentage margin thereon.

Clearly any information regarding the cost to appellant of labor and materials used in the preparation and delivery of new cars is completely irrelevant to an investigation of compliance with paragraph 3 of SR 5 to GCPR. The only relevant evidence concerning preparation and conditioning would be that amount *charged* by appellant for preparation and conditioning during the December 19, 1950-January 26, 1951, base period established in the GCPR, for that charge would be the ceiling price under GCPR and the maximum amount allowed for item (f) in paragraph 3 of SR 5 to GCPR.

Just as clearly, no information appearing on new car repair orders can be relevant to this investigation. The repair orders are used merely to show cost estimates for the benefit of appellant's accounting system, *i. e.*, how much shop labor and material costs should be assigned to new car sales (Tr. 19-20).

This information is also completely irrelevant to an investigation of compliance under CPR 83. Section 2 of that regulation provided as the ceiling price of a new automobile the sum of the following elements:

- (1) the "basic price," a dollar figure set by the O.P.S.,
- (2) a dollar charge for extra, special or optional equipment set by the O.P.S.,
- (3) transportation cost,
- (4) federal excise taxes charged the dealer,
- (5) state and local taxes imposed upon the dealer,
- (6) preparation and conditioning charge prevailing from January 26, 1951, to February 24, 1951, but not more than 5% of the basic price.
- (7) GCPR ceiling price for other services performed.

Here, again, it is obvious that the cost to appellant of labor and materials expended in preparing and conditioning new cars for delivery is a matter completely irrelevant to a question of compliance under CPR 83. The regulation simply does not touch upon appellant's costs. Nor does it relate in any manner to appellant's allocation of new car repair expenses on its books and records.

This being the case appellant submits that that portion of the order of the District Court objected to above must be stricken.

Furthermore, the court below ruled that no documents should be produced which are not within the record-keeping requirements of the regulations, and counsel for appellee agreed to this (Tr. 77). SR 5 to GCPR preserves the record-keeping requirements of GCPR. Section 16(a) of GCPR requires only the keeping of "sufficient records to establish the latest net cost incurred . . . prior to the end of the base period in purchasing the *commodities*" delivered or offered for delivery during the base period. No requirement appears with regard to records of the cost of services, in sharp distinction to the first part of that section, which requires records of prices charged for "*commodities or services.*" Section 16(b) of GCPR nowhere requires a seller to maintain cost records except with regard to commodities or services not delivered or offered for delivery during the base period, a situation not pertinent to this case. In other words, the documents to which objection is made are simply not required to be maintained by SR 5 to GCPR. Section 13 of CPR 83 required only that the customer invoices be maintained plus the records of prices and charges for sales of new cars, and that the records required by Section 16(b) of GCPR up to the effective date of CPR 83 (October 15, 1951) be preserved. According to the agreement of counsel for appellee made in open court (Tr. 77), appellee is entitled only to inspect customer invoices and other records of prices

charged, and not to the cost records specified in the order of the court below. Price records are the only records required to be maintained by the regulations involved.

Finally, the district court ordered the inspection of documents completely immaterial and irrelevant to *any possible proper investigation, inspection or inquiry that could have been made under the Act*. Information concerning the cost of labor and materials expended by appellant in the preparation and conditioning of new cars for delivery *after* July 26, 1951, the cut-off date in the Capehart Amendment, 50 App. USCA 2102(d) (4), which permits upward price adjustments equal to cost increases up to that date, is beyond the purview of the Act and thus outside the scope of the investigative powers of the President.

2. Both the administrative subpoena and the enforcement order are so vague that they authorize an unreasonable search and seizure in contravention of the Fourth Amendment.

- a. *The administrative subpoena.*

Reference has been made to the quantitative mass of materials required to be produced by appellee's subpoena and the lack of relevancy of a large portion of these materials to the scope of any inquiry under SR 5 to GCPR and CPR 83. Of course, in the absence of any determination of scope and purpose

of investigation, it is hardly possible to determine what materials are relevant and material.

A subpoena lacking any limitation of scope or purpose, vague and indeterminate in its description of testimony and material sought, has been held an unreasonable search and seizure contrary to the Fourth Amendment.

In *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, it was attempted to subpoena all records of respondent corporation of dealings, correspondence, contracts, etc., with six other firms.

The court held that a subpoena which was unduly broad, lacking in particularity and relevancy, might be an unlawful search or seizure under the Fourth Amendment, even though the court denied to corporations the protection of the provisions against self-incrimination contained in the Fifth Amendment. The court said:

“We are also of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces*

tecum is far too sweeping in its terms to be regarded as reasonable.”

Enforcement of a subpoena may be declined where the subpoena is, in terms, vague and unreasonable. Such vagueness may go to the description of the documents or testimony sought; or to the purpose for which it is to be used. The latter is closely related to the issue of materiality and relevancy discussed above.

EP-2 requires the documents sought by subpoena to be described “with reasonable particularity.” The principle was laid down in *Hale v. Henkel*, supra:

“Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena.”

As the court stated in *Bowles v. Abendroth*, (C. A. 9, 1945), 151 F.(2d) 407:

“Enforcement may, of course, be declined if the administrative subpoena is vague or unreasonably burdensome . . . or if the proposed inquiry is not authorized by statute, * * *”

Porter v. Clayton Packing Co. (D.C.E.D.N.Y., 1946), 65 F. Supp. 825, is an example of reasonable limitation of administrative subpoena, severely reducing the quantity of records sought.

The present subpoena refers merely to “records

and invoices relative to all sales of new automobiles sold from December 19, 1950, to present date, including records of service performed on said automobiles." The affidavit of Bishop (Tr. 14-20) makes clear the extent of these records, and their relation to the office organization and procedures of respondent. Whether records or invoices sought are all necessary to petitioner's purpose, such as it may be, does not appear.

As stated above, not only has no determination been made of the scope and purpose of this inquiry, but the confusion with regard to its scope and purpose has not been clarified by appellee. Such confusion makes the subpoena vague as to its purposes and, therefore, unreasonable as to respondent.

Vagueness as to purpose is combined with vagueness as to documents sought. The ten-day investigation by OPS agents most certainly familiarized them with the books and records kept by appellant. It is in the light of this information that the language of the administrative subpoena is wholly devoid of any particularity and leaves appellant to respond at its peril.

b. The enforcement order.

The Order of the District Court enforcing the administrative subpoena contains no finding that the documents sought were necessary, material or relevant to the purpose of the inquiry. The order does

not find what the purpose or scope of the inquiry may be. However, the order does first list *by name* certain documents to be produced.

The objection here is to the next part of the order reading as follows (Tr. 36): (Italics added)

“* * * and *any other records* not specified above which contain the following information as to new cars sold:

- (a) Date of sale.
- (b) Make of automobile, model, year and body style, motor number and serial number.
- (c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special, or optional equipment.
- (d) State and local taxes.
- (e) Charge for other services or items of equipment requested.
- (f) Finance charges, name of finance company, method of payment and amount of cash received;”

All tests of relevancy, materiality, scope, purpose and reasonable particularity of description are dispensed with by this order. Appellant is not informed of what records he must produce. He is simply told, at peril of contempt, to produce anything and everything which may contain any of the information listed. This demand for information regarding new cars could not be broader. Once more, the whole statutory and regulatory scheme for the control of administrative subpoenas has been disregarded.

It should be noted first that the records specifically designated by name in the order will cover all

the information sought by this "catch-all" provision, and the specific designation of records avoids uncertainty and ambiguity. The affidavit of Bishop (Tr. 14-20), and the Exhibits thereto, are ample evidence of this. In fact, counsel for appellee stated in argument that the affidavit of Bishop and accompanying exhibits were used in drawing up the order. (Tr. 87-88).

Secondly, it should be noted that the affidavit of Bishop and accompanying exhibits describe and exemplify the records kept by appellant with such detail that any such "catch-all" provision is completely unnecessary. Appellee and the court know the precise information desired and can specify the documents needed with precision by reference to the information supplied by appellant through Bishop.

Thirdly, it must be remembered that failure to obey the court order lays appellant open to a citation for contempt of court. Appellant should not be required to hazard a needless risk in this connection. Where the records required are capable of precise and exact designation, and both appellee and the court are in possession of a detailed description of the records, the order entered by the court should be precise.

The legal principles governing this question are too well known to require extensive elaboration. The Court must describe the documents to be produced

with reasonable particularity. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 90 L. ed. 614; *Hale v. Henkel*, supra. In view of the fact that the district court had before it a detailed description of the business records maintained by appellant in connection with new car sales, it is submitted that the district court failed to describe documents in terms of *reasonable* particularity when it included the "catch-all" provision objected to. It is apparent that this error is prejudicial to appellant. Obviously appellant maintains documents such as copies of routine correspondence which are not intended to be subject to production but which might contain information concerning one or more of the items specified in the "catch-all" provision. Yet if appellant does not completely denude its files of all papers bearing any information whatsoever regarding new cars sold, it runs the risk of a contempt citation. This cannot be said to be a reasonable requirement in view of the alternatives and information available to the court below.

C. THE COPYING OF BUSINESS RECORDS IS NOT AUTHORIZED BY THE DEFENSE PRODUCTION ACT OF 1950.

50 App. USCA 2155 (a) nowhere authorizes the copying or photographing of business records or other documents. In sharp contradistinction, Section 202(b) of the Emergency Price Control Act of

1942 authorized the Administrator to require any person to "permit the inspection *and copying* of records and other documents * * *" (Italics added.)

This omission to authorize copying in the 1950 Act must be deemed significant, since the two sections follow much the same pattern otherwise. Furthermore, 50 App. USCA 2155(c) provides that off-premises inspection shall not be required if the subject of the inspection furnishes certified copies of the documents sought to the President or stipulates as to their contents. By this section Congress recognized that copies may not be made by the O.P.S., and provided an incentive to the subject of the inspection voluntarily to furnish copies in order to avoid off-premises production for inspection. Thus the statutory scheme is complete. The O.P.S. is not authorized to copy business records, but a method is provided whereby the voluntary furnishing of copies to the O.P.S. will avoid unwanted interference with normal business operations. If the statute is construed to authorize the copying of documents by the O.P.S., then Section 2155(c) is without meaning.

Appellant submits that the part of the District Court Order permitting the copying or photographing of appellant's records is invalid.

D. THE ENFORCEMENT ORDER SANCTIONS OP-

PRESSIVE AND UNCONSTITUTIONAL ADMINISTRATIVE PROCEDURE.

1. The order denies appellant the due process of law required by the Fifth Amendment to the Constitution of the United States by authorizing on-premises inspection of documents after appellant was required to defend a motion for off-premises production of documents.

Appellant's argument on this point proceeds along two lines. First, the district court invaded the province of the Executive and Legislative Departments of the United States by substituting its judgment for that of the District Enforcement Director as to where the documents should be produced. This the district court had no power to do. Such an order cannot be said to be "due process" of law. Thus the district court exceeded its jurisdiction in a constitutional sense. The principle relied upon is exemplified by *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 84 L. ed. 1108, in which the Supreme Court said, by Mr. Justice Black,

"The case before us makes it fitting to remember that 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.'"

Likewise, in *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 67 L. ed. 731, the Supreme Court held

that the judicial power of the United States does not extend to administrative issues.

Here the Seattle District Enforcement Director determined that he wanted appellant's books and records produced at the Seattle District Office of Price Stabilization. To implement this decision he issued an administrative subpoena (albeit an invalid one as appellant contends) for the production of those records at that office. This failing, he sought an order from the Court below *enforcing his subpoena*. (Tr. 3-5). Instead of granting the relief sought the court below substituted its judgment for that of the Director, in an effort to cure a subpoena invalid when issued, and ordered inspection at a place other than that determined by the Director to be suitable. In 50 App. USCA 2155(a) the power to make this determination is vested in the executive department of the government, not the judicial department.

Sound policy dictates that this objection to the action of the District Court be sustained. A long judicial history attends the efforts of private citizens to force government agencies to observe the "fair play" requirements placed by the Constitution on matters of procedure. An administrative agency should be forced carefully to consider *prior* to the issuance of a subpoena or other demand what its impact will be upon the person affected. If the agency can proceed without such consideration and

make unreasonable demands in utter disregard of the requirements of law as to the extent to which a citizen may be unnecessarily burdened, always knowing that the only penalty will be a softening of the terms of the demand by a court *if the citizen can afford to seek court relief*, then there is no effective control over abuse by the agency of its power. Here the Director had alternative methods of procedure available to him. He could have served an inspection authorization upon appellant and, in the event of non-compliance, sought court enforcement of the authorization under 50 App. USCA 2156 (a). Such a procedure was authorized under similar provisions of the Emergency Price Control Act by this court in *G. H. Love, Inc. v. Fleming*, (C.A. 9, 1947), 161 F. (2d) 726. Or he could then have chosen the procedure he followed in this case. Having made his choice he should be forced to justify it on its own terms, not in terms of the other alternative. The district court, having decided that off-premises inspection was unreasonable, should have denied the relief sought and dismissed appellee's motion for enforcement, leaving appellee to its other remedies. As it is, appellant has been forced into court to defend the demand for off-premises inspection which the court below has concluded was unreasonable when appellant might have acceded to a reasonable demand for on-premises inspection. It should be noted that it was not until appellee sought

to remove records from appellant's premises for photostating that appellant resisted appellee's demands (Tr. 24, 26). The requirements of "fair play" inherent in the due process clause do not permit abuses such as this by federal agencies. Constitutional guarantees are flexible enough to meet new and oppressive procedures devised by governmental officials.

2. The terms of the order exceeded the scope of the pleadings, prayer and evidence before the court.

In this case the Seattle District Enforcement Director demanded off-premises production of documents by a subpoena *duces tecum*. That failing, the United States moved in the court below for enforcement, praying "that an Order be issued directing the respondent to appear forthwith at the Seattle District Office of Price Stabilization and give testimony, and produce documents described in the Subpoena Duces Tecum attached" to the motion (Tr. 5). The district court then granted an order authorizing on-premises inspection (Tr. 35-37). Appellant contends that the order of the court below exceeded the scope of the pleadings and prayer in the case and should be reversed. 50 App. USCA 2155(a), under which appellee expressly stated it was seeking relief (Tr. 3, 46), provides in part as follows:

"* * * In case of contumacy by, or refusal to obey a subpoena served upon, any person

referred to in this subsection, the District Court of the United States for any district in which such person is found or resides or transacts business, upon application by the President, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; * * *”

It should be noted that the grant of jurisdiction extends only to the issuance of an order requiring appellant to appear and give testimony and produce the documents called for.

50 App. USCA 2156(a) provides as follows:

“Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.”

50 App. USCA 2156(b) provides that the district courts of the United States shall have jurisdiction over any such actions.

50 App. USCA 2156(a) authorizes the court below, *in an appropriate proceeding*, to require an on-premises inspection, since Section 2155 authorizes on-premises inspections. In *G. H. Love v. Fleming*, *supra*, the district court had granted an order en-

forcing an "inspection requirement" of the O.P.A. The respondent there appealed, contending that the O.P.A. had the authority to inspect its records by a subpoena *duces tecum* only. The Circuit Court affirmed, holding that an inspection requirement could be enforced under that section of the Emergency Price Control Act (50 App. USCA 925 (a)) that corresponded to 50 App. USCA 2156(a). There, however, the Administrator began with an inspection requirement and sought enforcement thereof. In the instant case the O.P.S. began with a subpoena *duces tecum* requiring off-premises production and the court has granted an order enforcing on-premises inspection.

In *Porter v. Clayton Packing Co.*, supra, the Court ordered on-premises inspection when enforcement of a subpoena was requested by the O.P.A. The question here raised was not presented to the Court in that case.

In *Cudmore v. Bowles* (C.A.D.C., 1944), 145 F. (2d) 697, the Circuit Court upheld an order in the alternative of the District Court requiring respondent either to comply with the subpoena or to permit on-premises inspection. There it appears that the Administrator sought relief in the alternative.

Appellant has found no case where the question here presented has been ruled upon. Where the O.P.S. has chosen to move under one section of the Act, it

should not be granted relief under another section of the Act. Congress must be assumed to have had a reason for authorizing different procedures for obtaining court orders for on-premises and off-premises inspection, and that statutory distinction between procedures should be observed. Clearly the order of the District Court went beyond both statutory authority and the scope of the case before it.

3. The order authorizes unreasonable harassment.

We have heretofore discussed matters of law—whether appellee has conformed to the conditions expressly required by statute for the issuance of a subpoena; whether on the grounds of general doctrines of law relating to subpoenas appellee is entitled to enforcement, whether the order of the Court was reasonable and proper.

It is appropriate as well to consider the past relationship between appellant and appellee and to attempt to arrive at an appreciation of the equities as between these parties. It is appropriate that this court assure itself that appellee has by its actions proved itself worthy of an enforcement order.

The cases lay down the rule that the courts will not countenance undue harassment. In *Fleming v. Fossati* (1947, Ore.), 177 P.(2d) 425, the suit was to compel inspection of respondent's books and records. Respondent showed that her books and rec-

ords had already been inspected three times, and that further inspection would cause great injury. The enforcement was declined and the court said:

“Ordinarily, it is not essential to inspection that there be a showing of probable cause on the part of the administrative agency * * * but we think the lack of such showing, if, in fact, several other inspections have been made, should cause a court of equity to be reluctant to grant such extraordinary relief.”

In *Porter v. Clayton Packing Co.*, (D.C.E.D.N.Y., 1946), 65F. Supp. 825, the court declined to enforce a subpoena which would have removed so much of respondent's records as to necessitate a closing down of respondent's plant. The court, instead, granted an order allowing an inspection according to reasonable terms.

The affidavit of Bishop (Tr. 21) shows on how many occasions agents of appellee have been granted access to appellant's books and records. Indeed, such access was never refused and appellant resisted only when appellee made demand to remove all records for photostating or microfilming. It is especially noteworthy that for a period of ten days, agents Colman and Apstein investigated appellant's books and records in an office on appellant's premises, furnished by appellant. Colman states in his affidavit that he and Apstein investigated only invoices for the base period (Tr. 12) and for the month thereafter. This consumed ten days. Yet the

affidavit of Knudsen (Tr. 27), one of appellant's attorneys, shows that he reviewed all base period invoices for the purpose of determining maximum prices, in a period of approximately two hours.

The affidavit of Bishop shows the extent of records made available to petitioner's agents. It appears unreasonable to assume that in a ten-day period two of appellee's agents devoted themselves solely to the review of the records of five weeks, covering approximately 47 car sales (Tr. 26).

Appellant submits that appellee has had ample opportunity to review pertinent books and records and that any further review would be an unreasonable burden upon appellant who had, prior to this proceeding, offered full cooperation to appellee.

The time limit set up by the subpoena is a further indication of the unreasonable nature of appellee's demand. The subpoena, dated March 25, 1952, required the testimony on March 28, 1952. The courts have been aware of this element, as witness *Pinkus v. Porter* (C.A. 7, 1946), 155 F.(2d) 90, where one week was granted, and *Cudmore v. Bowles*, supra, where over a month was granted to respondent in which to produce certain invoices.

Appellant realizes that as of the date of the hearing, the time element was not the issue it was on March 28, 1952, but appellant points out this unduly short time limit illustrates appellee's efforts to harass appellant.

The affidavit of Colman states, at paragraph 4, that his check of invoices for one month after the base period shows a "consistent and continued practice * * * of charging in excess of maximum ceiling prices" (Tr. 12). The affidavit of Malone denies that this is so (Tr. 25). But, what is important about this allegation is that it is totally irrelevant to the subpoena requesting information relative to SR 5 and CPR 83. The base period ended January 26, 1951. One month after the base period brings us to February 26, 1951. SR 5 did not go into effect until March 2, 1951, and CPR 83 until October 15, 1951. Therefore, this allegation of Colman can have no bearing upon the subpoena.

Presuming the subpoena to relate only to SR 5 and CPR 83, this accusation of Colman, wholly irrelevant to the subpoena, must be construed as an effort, by wholly unsupported allegation, to impute to appellant violations of the Act. The alleged violations were presumably brought to the attention of the court in order to influence the court to grant the enforcement order. Such unwarranted prejudicial conduct should not be countenanced. The inclusion of this irrelevant and immaterial allegation must be deemed but another example of appellee's unwarranted and unseemly harassment of appellant.

4. The cumulative effect of the administrative improprieties stated above is such that the district court committed reversible error in granting the enforcement order.

In the words of Professor Gellhorn, an eminent authority upon the subject of administrative law:—

“Where courts are willing to undertake an evaluation of a whole case, rather than a single part of it, the advocate must be sensitive to the cumulative effect of errors. It is sometimes possible, by tracing the entire story of a proceeding, to show a vitiating unfairness, even though one cannot with assurance rest his finger on a particular element of the unfairness and say, ‘*There is the vice.*’ It is the atmosphere of the whole which establishes the unfairness of its several parts. The effective advocate will exercise self-restraint in arguing that there were errors in the administrative process, because the presentation of numerous objections of a frivolous character will cast a shadow over whatever meritorious contentions may remain. The point to remember is, simply, that procedural criticisms, which standing alone might be unpersuasive, acquire force when they are linked with others.” *Gellhorn, Administrative Law*, 442 (1947 ed.).

Here is a case where O.P.S. investigators apparently intending to make an exhaustive compliance investigation, after a series of prior investigations and price checks, were admitted to business premises and falsely represented that they were gathering data for a revision of the applicable regulation or for a Congressional hearing (Tr. 22-23). After full and complete access to appellant’s records for ten

days, the investigators unlawfully demanded to be permitted to remove all of appellant's business records and photostat them. An O.P.S. attorney subsequently stated to appellant's counsel that the investigation concerned only pricing under SR 5 to GCPR, when in fact appellee's own purported "definition of the scope and purpose of the inquiry" included pricing under CPR 83 (Tr. 27). Failing of its plans to remove and photograph appellant's records, the agency served upon an officer of appellant a subpoena in sweeping terms, compliance with which would practically halt its normal business operations. Since appellant had not yet been informed of the scope and purpose of the inquiry, it did not comply with what it considered an unlawful demand. The agency then went to the Federal District Court seeking judicial sanction of its action. Learning at that stage that appellant was aware of its statutory rights, the agency, belatedly, at 11:00 o'clock A. M. on the day of the hearing, disclosed that hidden in a filing cabinet was a printed administrative form purporting to satisfy the requirement of a prior definition of scope and purpose. The agency itself alleged conflicting dates of execution (Tr. 28-33, 51-52). The so-called "definition of scope and purpose" is as broad as the statute relied upon, and refers to an "attached file" for further amplification. The court, pressed for time because of other urgent judicial business, stating that "a

showing" had been made, granted the request of the agency for enforcement, disregarding appellant's objections. Appellant submits that a federal agency which has arrogated to itself powers beyond its statutory authority, which has misrepresented and hidden its purpose, which has insisted upon an authoritarian right to inquire into all phases of the business of a private citizen whether relevant or not to the statute of its creation, is guilty of administrative improprieties the cumulative effect of which colors the whole proceeding to such an extent that the district court must be held to have committed reversible error in acceding to the request for enforcement. Sound policy requires that the government employ a standard of procedural ethics at least equal to that required of private individuals.

"If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' It is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." *Farrell v. Placer County* (Cal. 1944), 145 P (2d) 570, 572.

V. CONCLUSION

In the light of the foregoing, appellant submits that the administrative subpoena of March 26, 1952, was invalid when issued and that it was erroneous for the district court to grant an order of

enforcement. The district court committed further error in the excessive scope of the relief granted, measured against the prayed-for relief and the applicable statutes and regulations, and in its failure to designate documents authorized to be inspected with that degree of particularity required by law.

The cumulative effect of these errors and the undue and unreasonable harassment of appellant by appellee provides ample reason for the reversal of the Order Enforcing Administrative Subpoena, of April 16, 1952.

Appellant, therefore, prays that the Order Enforcing Administrative Subpoena, of April 16, 1952, be vacated and set aside; and that enforcement of the administrative subpoena of March 26, 1952, be denied.

Respectfully Submitted,

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IN THE
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WESTSIDE FORD, INC., a corporation,
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Appellee.

ON APPEAL FROM ORDER ENFORCING
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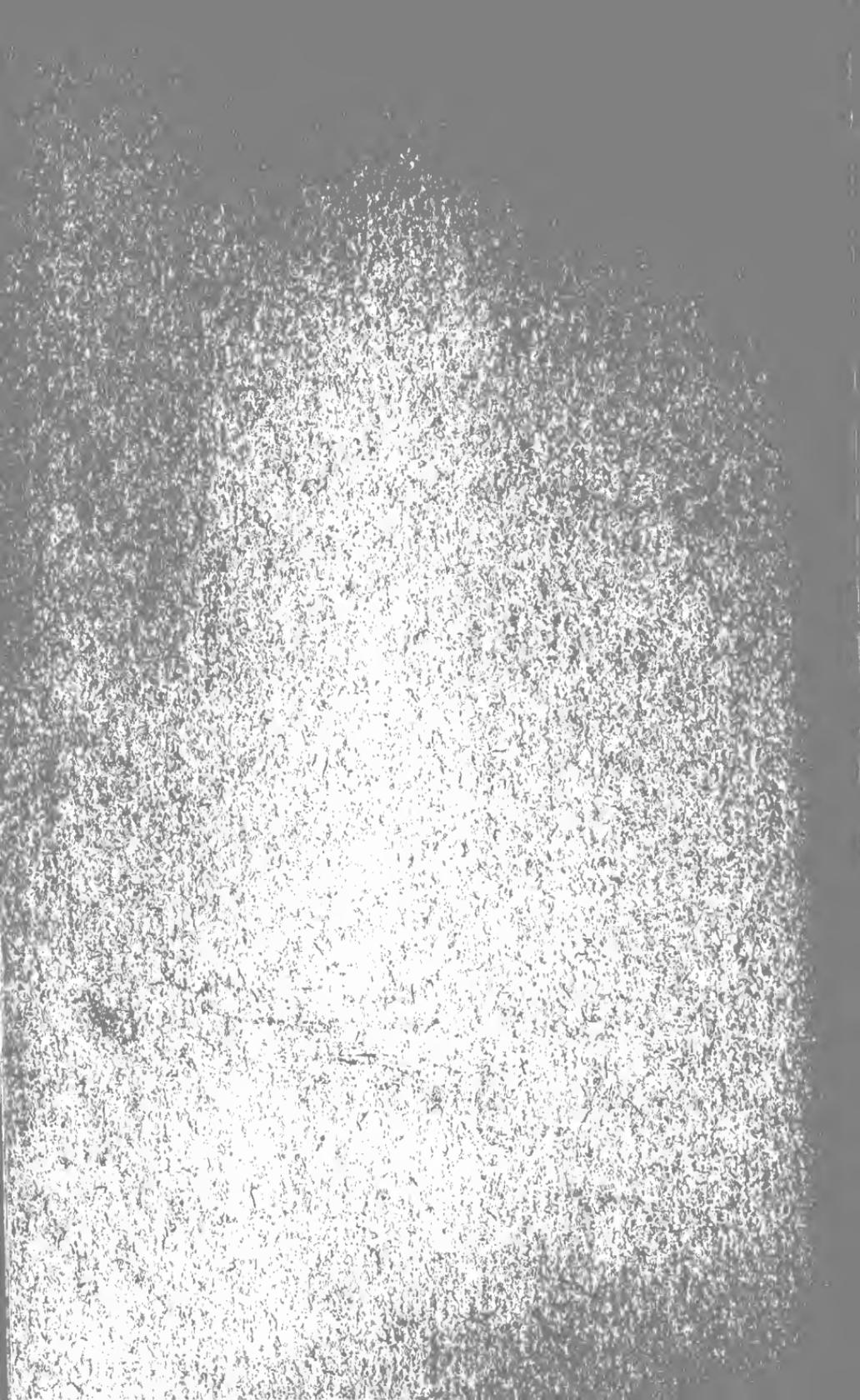
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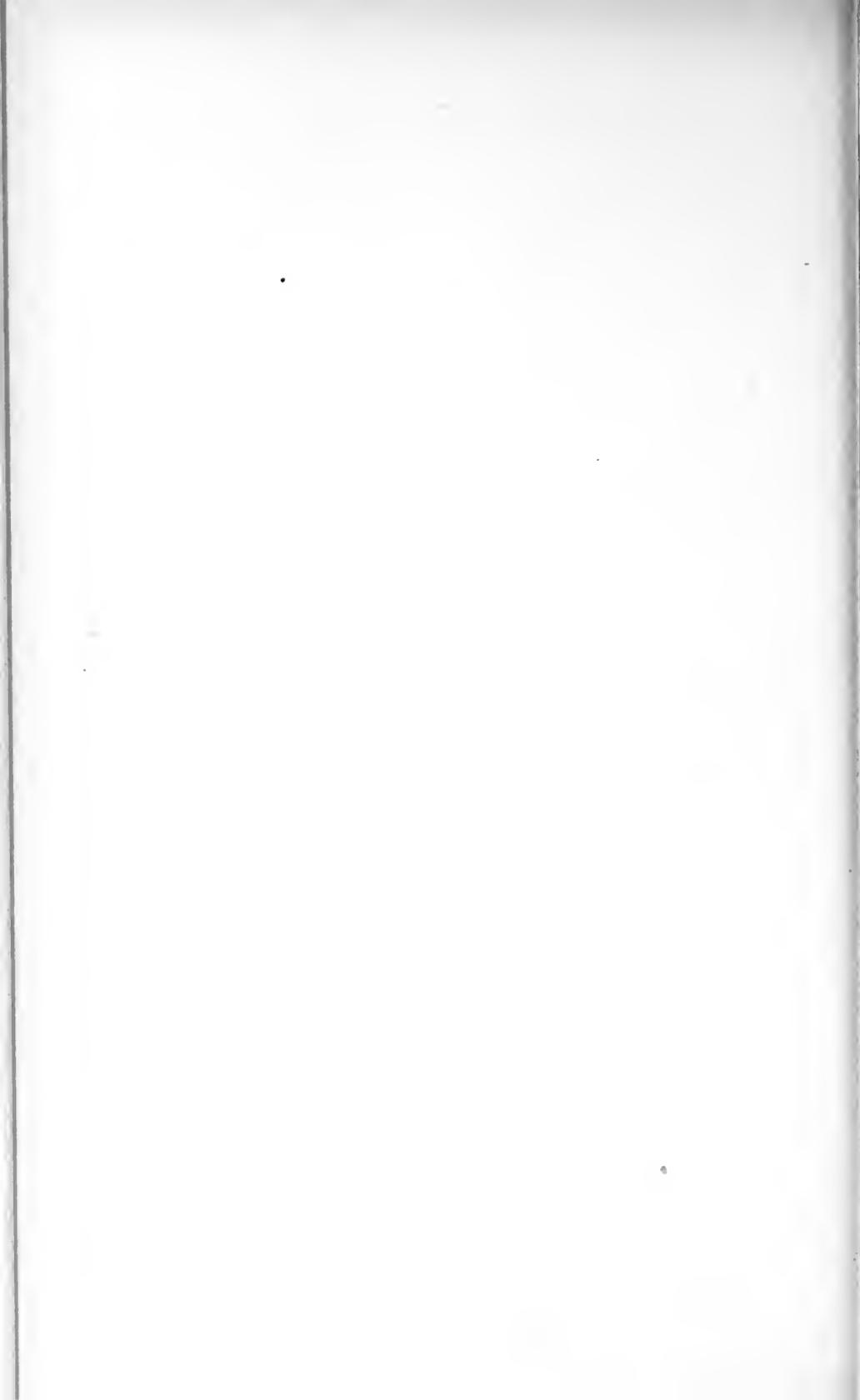


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IN THE
United States
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WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM ORDER ENFORCING
ADMINISTRATIVE SUBPENA

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEE

I. STATEMENT OF THE CASE

On March 10, 1952 John H. Binns, District Enforcement Director of the Office of Price Stabilization, Seattle District, acting under delegation of authority from the President of the United States, instituted an investigation of Appellant and defined its

scope and purpose, using O.P.S. Form 228, duly completed and signed, for this purpose (Tr. 28-33). It should be noted that at Tr. 29 this date is incorrectly stated as March 3, 1952. The correct date is found at Tr. 32 near the bottom of the page. See also Tr. 51-52. The investigation dealt solely with sales of new automobiles.

A partial examination of Appellant's records relating to new automobiles was made by O.P.S. investigators between March 11 and March 25, 1952 (Tr. 9, 12).

It became apparent that a detailed sales audit was necessary to determine overcharges (Tr. 9). The records of the company relating to the sales of new automobiles and services performed thereon are voluminous, involving as many as eleven different documents in connection with each new car sale (Tr. 15-20). Approximately 365 new automobiles were sold during the period subject to investigation. About 1200 files must be examined in order to sort out the proper 365. An audit of the period therefore involves examination of 1200 sales, segregation of 365 sales and detailed examination of as many as 4000 separate documents.

In an attempt to shorten the investigative process, Harold F. Nelson, one of the O.P.S. Enforcement

Attorneys, suggested that the records be microfilmed. Appellant referred the matter to its attorneys who not only refused to permit microfilming but also refused all further inspection (Tr. 8).

Thereupon on March 26, 1952 the District Enforcement Director issued a Subpena Duces Tecum commanding the President of Appellant to appear at the O.P.S. office at 10:00 a. m., on March 31, 1952, and give testimony and bring with him the documents relating to all sales of new automobiles and service thereon from December 19, 1950 to March 25, 1952 (Tr. 5-8). The Subpena was not obeyed (Tr. 8-9).

Appellee thereupon on April 3, 1952 moved the District Court for an Order to enforce compliance with the Subpena (Tr. 3-5). On April 16, 1952, after hearing on affidavits, and extended oral argument, the District Court by Judge John C. Bowen entered an Order Enforcing Administrative Subpena requiring the production of the desired records and permitting Appellee to inspect and copy or photograph the same (Tr. 35-37).

The Order grants less than the requested relief and falls short of the demand of the Subpena in that it does not specifically mention testimony, and it provides for production of the records at Appellant's place of business rather than at the O.P.S. office. It

also limits the time to the business hours of certain days (Tr. 36-37).

These modifications were made either at the request of Appellant's attorneys or with their full approval (Tr. 88-91). Appellee has not cross-appealed.

II. SUMMARY OF ARGUMENT

It is the position of Appellee that everything done by the Office of Price Stabilization in this case is well within the discretion granted to the District Enforcement Director, and that the Court's Order is well within the Court's jurisdiction and authority.

- A. The scope of the Director's authority is broad. The investigation is a legal one if the data sought concern a matter within the jurisdiction of the agency.
- B. All records kept pursuant to O.P.S. regulations or orders are within the jurisdiction of O. P. S.
- C. It is the prerogative of the District Enforcement Director to determine the extent and relevancy of the data to be inspected. His determination will not be set aside unless it is arbitrary or unsupported in fact or law.
- D. The Court should not inquire into the question of relevancy or reasonableness unless it appears that

the Director's determination is arbitrary, and the mere fact that the Director issued the Subpena is sufficient to show that he deemed the information necessary or proper to aid in the administration and enforcement of the Act, and that he has not acted arbitrarily or undertaken to pursue an unnecessary investigation.

- E. The manner of conducting the investigation is within the discretion of the District Enforcement Director. Standards of materiality and relevancy are less rigid than in a trial or adversary proceeding.
- F. The purpose and scope of the investigation were legally and adequately defined on March 10, 1952.
- G. In a matter involving an administrative Subpena Duces Tecum there is nothing in the Statute or elsewhere providing for advice to or service upon the Appellant of anything defining the scope or purpose of the investigation.
- H. There is nothing in the Statute or elsewhere providing for service of an Inspection Authorization prior to the service of a Subpena.
- I. All documents mentioned in the Subpena are material and relevant to this investigation. The Sub-

pena clearly and adequately defines and describes the records sought.

- J. The Order of the District Court did not in any respect exceed the scope of the pleadings, prayer, and record. On the contrary, it restricted them and granted Appellant partial relief to which it was not strictly entitled.
- K. The provision for photographing the records in no sense prejudices the Appellant, since photographing is a form of copying and copying is a necessary incident in the inspection of voluminous records.
- L. There was no harassment of Appellant.
- M. No constitutional right of Appellant has been violated.
- N. Since everything done by the Agency was in order and the trial court acted within the limits of its authority, the cumulative effect cannot be erroneous.

III. ARGUMENT

A. AUTHORITY OF DISTRICT ENFORCEMENT DIRECTOR.

In the matters of investigation a very broad authority has been delegated to the District Enforcement Director. Executive Order 10161, September 9, 1950 (15 F.R. 6105), as amended; Economic Stabilization Agency General Order No. 2, January 24, 1951 (16 F.R. 738); Delegation of Authority 4, Supplement 1, (16 F.R. 3595) Revised (16 F.R. 4359).

It is sufficient if the data sought concern a matter within the jurisdiction of the Agency.

In *Perkins v. Endicott Johnson Corp.*, 128 F. (2d) 208, certiorari denied 317 U.S. 607, 87 L. Ed. 492, the Circuit Court of Appeals for the Second Circuit said:

“If an administrative investigation ‘be duly authorized, it is no more subject to obstruction than judicial proceedings’.”

The inner quotation is from *McCann v. S.E.C.* 87 F. (2d) 377, 379, 109 A.L.R. 1445.

In *Hagen v. Porter*, 156 F. (2d) 362, decided by the Ninth Circuit Court in 1946, certiorari denied 329 U.S. 729, 91 L. Ed. 631, this Court held that showing probable cause is not a prerequisite to en-

forcement of an administrative Subpena under the Emergency Price Control Act of 1942. It further held that in an ex parte inquiry to determine existence of violations of the Statute, wherein production of documents by Subpena Duces Tecum is sought, standards of materiality or relevancy are less rigid than those applied in a trial or adversary proceeding. This holding bears a striking analogy to the modern rules of Court which provide that in discovery proceedings inquiry may be made as to anything which may lead to evidence. The Court further held that it will take judicial notice of the contents of the regulations and that the presumption of regularity of the acts of administrative officers will prevail in the absence of convincing affirmative evidence to the contrary.

B. RECORDS WITHIN O.P.S. JURISDICTION.

All records kept pursuant to O.P.S. regulations or orders are within the jurisdiction of O.P.S. *Perkins v. Endicott Johnson Corp.*, supra; *Dossett v. Porter*, 161 F. (2d) 839.

The regulation governing this investigation is Ceiling Price Regulation 83. Section 13 of that Regulation provides as follows:

Sec. 13. Records.

“(a) The provisions of the General Ceiling Price Regulation are hereby continued in effect insofar

as they apply to the preparation and preservation of such 'current records' as you were required to make covering sales between January 26, 1951, and the effective date of this regulation.

(b) You shall preserve for two years the invoices required to be retained in section 10 of this regulation and all other records showing your prices and charges for sales of commodities subject to this regulation."

Section 10 of C.P.R. 83 defining the invoices required to be retained reads as follows:

Sec 10. Invoices.

"Whenever you make any sale (whether at wholesale or retail), on and after December 10, 1951, you shall prepare an invoice in duplicate, one copy of which shall be given to the purchaser within 7 days and the other copy you shall retain in your records.

This invoice shall set forth the following information unless any item of the following is contained in any other document delivered to the purchaser within 7 days from the date of the sale:

- (a) Date of sale.
- (b) Make of automobile, model, year and body style, motor number and serial number.
- (c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special, or optional equipment.
- (d) State and local taxes.
- (e) Charge for other services or items of equipment requested (undercoating, glazing, etc.).

- (f) Finance charges, name of finance company, method of payment and amount of cash received.
- (g) If a used car is traded in as part payment for the new automobile, the invoice must show the following information with respect to the car traded in:
 - (1) Make of automobile traded in, model and body style and optional equipment thereon.
 - (2) Allowance made on the trade in.
 - (3) Motor number and serial number.”

It should be noted that the quotations above are from the original issue of C.P.R. 83 (16 F.R. 10594) issued October 15, 1951, as amended November 5, 1951 (16 F.R. 11504), which was in effect at all times pertinent to this case. Revision 1, issued August 18, 1952 (17 F.R. 7572) made some changes in section numbering and important changes in the substance. A comparison of either the Subpena or the District Court's Order with the requirements of the Regulation is all that is necessary to establish O.P.S. jurisdiction as to the records sought.

Section 16 of the General Ceiling Price Regulation (16 F.R. 808) so far as the same is pertinent to this case, requires the keeping of records as follows:

“(b) Current records. If you sell commodities or services covered by this regulation you must

prepare and keep available for examination by the Director of Price Stabilization for a period of two years, records of the kind which you customarily keep showing the prices which you charge for the commodities or services. In addition, you must prepare and preserve records indicating clearly the basis upon which you have determined the ceiling price for any commodities or services not delivered by you or offered for delivery during the base period. If you are a retailer you are required to preserve your purchase invoices and to record thereon both your initial selling price and the section of this regulation under which you have determined your ceiling price."

Appellant's invocation (Brief, 27) of the Capehart Amendment, 50 App. USCA 2102 (d) (4), is completely beside the point, as clearly appears from the text, which reads:

"(4) After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring sub-

sequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the President shall adjust any such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term 'costs' includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive."

It is apparent that, under this provision, many ceiling prices existing at the time of its passage can be justified and will remain in force, and that in no case is an adjustment automatic. There must be an application and a proper showing. Unreasonable and excessive costs may be excluded and disregarded. Moreover, there is no provision for a retroactive adjustment.

Appellant has not stated or suggested that it has applied for an adjustment.

It is therefore apparent that the costs of labor and materials in question are pertinent. Under the Regulations, phantom services may not be made the basis of a charge, so it is proper in every case to match the cost against the charge in order to determine whether service was, in fact, rendered, and, if

so, what service. Until an application for adjustment is made and granted, the standard set by the Regulation is conclusive.

C. DETERMINATION OF EXTENT AND RELEVANCY OF INSPECTION.

It is the prerogative of the District Enforcement Director to determine the extent and relevancy of the data to be inspected. His determination will not be set aside unless arbitrary or unsupported in fact or law. *Benenson Realty Corp. v. Porter*, 158 F. (2d) 163 (Em. C.A.).

As this Circuit Court of Appeals said in *Bowles v. Abendroth*, 151 F. (2d) 407 at page 408:

“We think the courts may not substitute their judgment of the necessity or desirability of an investigation for that of the agency made responsible by Congress for the policing of war-time prices.”

The Eighth Circuit Court of Appeals said in *Creedon v. Warner Holding Co.*, 162 F. (2d) 115, at pages 119-120:

“It requires the presence of unusual and prejudicial circumstances to show that a request of the Administrator to inspect relevant and material books and papers is unreasonable.”

In this case the discretion of the Director is supported by the order of a careful, conscientious and ex-

perienced District Judge who, out of excess of caution, whittled down the Subpena somewhat, but ordered compliance with its essential part. This should be all but conclusive.

D. PROPER EXTENT OF COURT'S INQUIRY AS TO RELEVANCY AND REASONABLENESS.

The Court should not inquire into the question of relevancy or reasonableness unless it affirmatively appears that the Director's determination is arbitrary. The mere fact that the Director has issued the Subpena is sufficient to show that he deemed the information necessary or proper to aid in the administration and enforcement of the Act, and that he has not acted arbitrarily or undertaken to pursue an unnecessary investigation.

In *Bowles v. Northwest Poultry and Dairy Products*, 153 F. (2d) 32 at page 34, this Court said:

“Because of the well established presumption of regularity attending acts of administrative agencies, the mere fact that the Administrator issued an inspection requirement is sufficient to show that he deemed the information sought here necessary or proper to aid in the administration and enforcement of the Act and that he has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent.”

That case is in many ways analogous to the instant case. The Administrator sought:

“To inspect and copy all (the company’s) purchase and sale records and disbursement records covering appellee’s sale and purchase of all turkeys from May 8, 1944, to and including August 10, 1944, including the records showing whether or not the corporation had complied with the prices for processing turkeys under Regional Order G. 93.” (page 33.).

The District Court had refused to order enforcement of an Inspection Request in the terms quoted. This Court reversed the District Court, and clearly laid down the proper judicial policy in the following words—

“Unless the federal courts approach the judicial problems of enforcement of the Act with a clear vision of what are the destructive evils of price inflation, and with the intent not to weaken the Administrator’s hand in the legal exercise of the powers Congress has given him the beneficent purpose of the legislation will be frustrated.” (page 34).

In *Perkins v. Endicott Johnson Corp.*, supra, the Court said:

“The administrative officer may properly consider evidence which would be incompetent in a judicial trial and which a court in a preview hearing would disregard.” (page 223).

E. MANNER OF CONDUCTING INVESTIGATION.

The manner of conducting the investigation is within the discretion of the District Enforcement Director. In *Bowles v. Baer*, 142 F. (2d) 787, Judge Minton, now of the Supreme Court, speaking for the Circuit Court in a case involving an O.P.A. Subpena *Duces Tecum* said, at page 789:

“The Administrator was given authority to subpoena witnesses before him for investigation. If they refused to appear and testify or to bring the requested documents, the Administrator was authorized to apply to the District Court for an order requiring them to comply with his subpoenas. On such application, the District Court has to determine only whether the Administrator was conducting an investigation, whether he had subpoenaed the witnesses named in the complaint to appear and bring the papers and documents properly identified in the subpoenas, and whether the witnesses had refused to comply.’

Standards of materiality and relevancy are less rigid than in a trial or adversary proceeding. *Hagen v. Porter*, *supra*.

F. PURPOSE AND SCOPE LEGALLY DEFINED.

Purpose and scope of the investigation were legally and adequately defined on March 10, 1952 (Tr. 31-33). The District Enforcement Director has been

delegated as competent authority to define the scope and purpose of an investigation inspection or inquiry within his District. See citations in paragraph III. A above. There is nothing in the law which requires that the definition of scope and purpose be in writing or that it be in a specific form or that the subject be advised of the scope and purpose of the investigation, inspection or inquiry. Form 228 was created for administrative reasons in the Office of Enforcement in order that there might be a document in the record to show what had been determined. The subject of the investigation is the Appellant. S.R. 5 of the General Ceiling Price Regulation deals with retail prices for new and used automobiles; paragraph 5 thereof deals with ceiling prices of new automobiles. C.P.R. 83 deals with retail and wholesale sales of new passenger automobiles. The Appellant was subject to such regulations and undoubtedly cognizant thereof. As appears from the Form 228, the purpose of the investigation was to determine whether Appellant was complying with the Defense Production Act and the regulations mentioned. Its scope included examining, copying, and making notes of the books of account, statements, records, schedules, sales slips, papers documents and any and all other writings of every kind, nature and description required to be kept by the person named therein by the Defense

Production Act of 1950 and Regulations or Orders issued thereunder. It is difficult to imagine what more could have been put into the document unless the results of the investigation had been known in advance.

Appellant, at page 16 of its Brief poses a question:

“The question may be raised how Appellee can possibly determine what documents are vital to the scope of his investigation, purpose having been determined, if it is not familiar with the business, records, and files of the parties investigated.”

Appellant's solution is to postpone definition of the scope of the investigation until *after the* records have been given at least a preliminary examination.

To demonstrate the fallacy of this proposition it need only be stated clearly. The statute, 50 App. U.S.C.A. 2155 (a), Section 705(a) of the Defense Production Act, 1950, clearly requires definition of both purpose and scope before *any part* of the investigation is undertaken. It is obvious that such definition must, in the nature of things, be general. Otherwise, there could be no investigation if the subject refused all information. Moreover, there is no authority for requesting even preliminary information until purpose and scope have been defined.

G. DEFINITION OF SCOPE AND PURPOSE
NEED NOT BE SERVED UPON SUBJECT
OF INVESTIGATION.

In a matter involving an administrative Subpena there is nothing in the Statute or elsewhere providing for advice to or service upon the Appellant of anything defining the scope or purpose of the investigation. Appellant on page 17 of its Brief baldly asserts, and throughout its argument assumes, that the purpose of the Form 228 is to advise the party subpoenaed "so that he may know the scope and purpose of the investigation and hence the testimony and documents required in response thereto." No authority is cited for this position and none can be found. The Subpena itself tells him what is wanted. The quotation of EP-1 in Appellant's Brief, 17, has nothing to do with a Subpena Duces Tecum. It refers to Inspection Authorizations which, while in some degree analogous to Subpenas Duces Tecum, differ from them in important particulars. It is interesting to note that EP-1 defining and providing for Inspection Authorizations, and EP-2 defining and providing for Subpenas, were issued on the same day. They appear on the same page of the Federal Register (16 F.R. 2496), they are effective as of the same date, yet neither refers to the other.

The quotations from EP-1 and EP-2 appearing at page 11 of Appellant's Brief make it plain that an Inspection Authorization is required to contain information as to scope and purpose, whereas in case of a Subpena Duces Tecum it is only necessary that the District Enforcement Director has in fact defined it. EP-2 does not conflict with the Statute; EP-1 goes beyond statutory requirements.

H. INSPECTION AUTHORIZATION NEED NOT PRECEDE SUBPENA.

There is nothing in the Statute or elsewhere providing for service of an Inspection Authorization prior to the service of a Subpena. Appellant's counsel at pages 8-10 of their Brief make an ingenious argument for the proposition that an Inspection Authorization must be served before a Subpena. This is sheer wishful thinking, unsupported by authority. The case of *Bowles v. Sachnoff* (D.C.W.D. Pa. 1946) 65 F. Supp. 538, quoted at page 9 of Appellant's Brief, does not support the construction placed upon it. In that case, the only request made by O.P.A. was oral. The Court merely held that it would not enforce an oral request. The last sentence quoted makes it clear that the Court used the term "Subpena Duces Tecum" in a sense broad enough to include both the Subpena proper and the Inspection Request,

the latter being the O.P.A. document corresponding to the Inspection Authorization of O.P.S.

In this connection it should be noted that while there are many similarities between the Inspection Authorization and the Subpena, there are also many differences. The Inspection Authorization is intended to be used only at the place where the books and records are customarily kept, or his business is conducted. Its scope is limited to an inspection of physical, tangible books, records, writings, premises and property. The Subpena adds a new element "testify under oath." It retains the language as to "books, records, and writings" but omits all reference to inspection of premises and property. It is apparent that the two have only one element in common — the inspection or production of books, papers, and records. As to this element, the Inspection Authorization is limited to one place, the Subpena is not so limited. Under the Inspection Authorization the Government cannot require testimony. Under the Subpena it cannot inspect premises or property.

If then the Government wants testimony under oath it must use the Subpena. The Inspection Authorization is completely ineffectual for this purpose. Such testimony, together with the production of records upon which the witness was to be inter-

rogated, is exactly what the Government asked in this case. If an Inspection Authorization had been served and complied with, the testimony would still be lacking. Upon Appellant's theory the Government would then have to serve the Subpena in order to get what it wanted in the first place.

In the instant case there was a refusal to comply with a request for information. See affidavit of Harold F. Nelson (Tr. 8), which states "that R. W. Graham of the said law firm, acting on behalf of Westside Ford Company, refused to permit the request and in fact refused any inspection of the records whatsoever."

In view of this evidence and this proceeding, it is a little startling to read at page 10 of Appellant's Brief that there is no indication that Appellant would have declined reasonable inspection under an appropriate authorization." One wonders why we are here, particularly since the District Court, incorrectly we think, whittled the relief granted to almost exactly the dimensions which Appellant suggests.

I. ALL DOCUMENTS DEMANDED ARE MATERIAL AND RELEVANT.

All documents mentioned in the Subpena are material and relevant to this investigation. The Subpena clearly and adequately defines the records sought as follows: (Tr. 6) "records and invoices relative to all sales of new automobiles sold from December 19, 1950 to present date, including records of service performed on said automobiles." A comparison of this language with Sections 10 and 13 of C.P.R. 83, Section 16(b) of the General Ceiling Price Regulation, effective until March 2, 1951, and Section 3 of S.R. 5, effective from that date to October 15, 1951, makes it entirely clear that everything requested is entirely proper and relevant to this investigation.

Appellant, at pages 24 and 25 of its Brief, argues that information regarding the cost of preparation and delivery of new cars, and new car repair orders, are irrelevant. It is plain from Paragraph 3, S.R. 5 to G.C.P.R., partially summarized by Appellant at pages 23 and 24 of its Brief, that the dealer's ceiling price under the G.C.P.R. for preparing and conditioning a new automobile for delivery is one of the elements going to make up the ceiling price of the automobile. In other words, the ceiling price cannot be determined under S.R. 5 without this infor-

mation. Similarly, the dealer's ceiling price under G.C.P.R. for any other services performed is an element entering into the ceiling price. Section 2 of C.P.R. 83, imperfectly summarized at page 25 of Appellant's Brief, states that the preparation and conditioning charge, and G.C.P.R. ceiling price for other services "requested in writing by the customer, and customarily performed on new cars by the seller", enter into the ceiling price of the automobile under C.P.R. 83. It should also be noted that Section 7 of C.P.R. 83 as originally issued October 15, 1951, which was in effect until August 23, 1952, provides as follows:

"Section 7(a). The charge for preparing and conditioning the new automobile for delivery shall be your charge for preparing and conditioning prevailing during the period January 26 to February 24, 1951, but not in excess of 5 percent of the basic price of the automobile, until a specific preparation and conditioning charge is established by the Director in a Special Order. The preparing and conditioning charge must be directly related to services actually rendered in preparing the new automobile for delivery. If no services are rendered you can make no charge for preparing and conditioning. The preparing and conditioning charge does not include advertising charges or any other charge which represents an item not directly a part of the preparation for delivery."

The provisions, "requested in writing by the customer," and "if no services are rendered, you can

make no charge" should be specifically noted. One of the things which the Office of Price Stabilization must look for in cases of this sort is what are known as "phantom services", that is, services charged for though not rendered. It is obvious that repair orders and records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery are the places where investigators must look for the covering up of such phantom charges. This the District Court recognized in the wording of its Order. These records are very definitely relevant to the subject and are specified as records required to be kept under C.P.R. 83, Section 10 (c) and (e). Section 16 of the G.C.P.R. requires keeping and preservation of records as to all commodities and services.

J. DISTRICT COURT ORDER DID NOT EXCEED PROPER SCOPE.

The Order of the District Court did not in any respect exceed the scope of the pleadings, prayer, and record. On the contrary, it restricted them and granted the Appellant partial relief to which it was not strictly entitled.

The Subpena clearly and adequately defined and described the records sought. There can be no doubt that Appellant knew exactly what was required. The

affidavit of its Business Manager William L. Bishop (Tr. 14-20) proves beyond a possible doubt that the Appellant knew exactly what was wanted. He obligingly furnishes the most precise specifications to indicate clearly that Appellant completely understood the requirements of the Subpena.

Appellant cannot properly complain that the Court's Order provides for on-premises inspection, since this provision was inserted by the Court for Appellee's benefit as a partial measure of relief pursuant to at least an implied request of Appellant. The affidavit of Bishop (Tr. 14-20) seeks to make out a case of hardship by asserting that the various records sought are not segregated in the files. Affidavits of Bishop (Tr. 24) and Graham (Tr. 26) insist that Appellant has never refused to permit inspection of the records at its place of business. Appellant even now asserts at page 10 of its Brief "there is no indication that Appellant would have declined reasonable inspection under an appropriate authorization." The Court did not believe these protests but they make it plain that in Appellant's opinion on-premises inspection is much less burdensome than taking the records to the O.P.S. office. Common sense says the same.

The Order was settled after a rather lengthy discussion in which Court and counsel for both parties

freely took part. The first reference to place of inspection occurs at Tr. 55. Mr. Frye, one of Appellee's attorneys, emphasizing the fact that what the Government most wanted was inspection of the documents, stated as a concession to Appellant "In fact the Government would be willing now, as it has been in the past, to stipulate for an Order that will allow the Government to go ahead and make an inspection of the records on the defendant's premises. However, the defendant is not willing now, nor has he been willing, to permit such inspection." There was no comment from Appellant's counsel. At Tr. 64 Appellant's counsel complains of the proposed removal of its records from its place of business as the cause of its feeling that "that had been enough." There was no other argument on the question of place.

The Court announced, apparently on its own Motion (Tr. 75) that production of the records would be required at the plant of the respondent corporation "and there will be no Order of the Court at this time for the production at the offices of the enforcement officer."

All of this was obviously for the benefit of the Appellant who is in no position to complain. Indeed its counsel made no complaint or protest when the Court announced that ruling. We think the Court

was technically wrong in changing the place but it is certainly not a mistake of which Appellant can complain. We need not discuss the interesting possibility that a cross appeal by the Government would have been in order.

The Order of the District Court requires the production of documents. That is one of the things expressly authorized by 50 App. U.S.C.A. 2155(a), which is quoted at pages 38 and 39 of Appellant's Brief. The Court could have required more, but did not. The statute does not attempt to limit or define the place where the documents are to be produced.

The case of *G. H. Love, Inc., v. Fleming*, 161 F. (2d) 726, decided by this 9th Circuit Court, which Appellant cites at pages 37 and 39 of its Brief, does not assist Appellant. That case was decided in favor of the United States. It properly upholds an O.P.A. Inspection Requirement. It also overrules the customary claim of violation of the Fourth Amendment to the Constitution of the United States.

Porter v. Clayton Packing Co. (D.C.E.D. N.Y., 1946) 65 F. Supp. 825, is on all fours with the instant case. The Subpena in that case called for production of voluminous records at a distance from the company's plant. The Court granted inspection at the

plant. Yet Appellant cites this case as one which upholds its position. (Appellant's Brief 40, 42).

Cudmore v. Bowles (C.A.D.C. 1944), 145 F. (2d) 697, cited by Appellant at page 40 of its Brief is a strong case which sustains our position, not Appellant's. The Court order required respondent to comply with the Subpena or, in the alternative, to permit on-premises inspection. Despite Appellant's assertion (Brief 40) there is nothing in the report which even suggests that the Government sought relief in the alternative.

Appellant is wrong in asserting that the question here presented is one of first impression. The two cases last cited clearly deal with an analogous situation. The argument that "statutory distinction between procedures should be observed" (Brief 41) assumes that the Congress has gone out of its way to reverse the modern trend by unnecessarily multiplying forms of action. One more step backward, and we shall find ourselves involved in the intricate niceties of assumpsit and trespass on the case.

K. PHOTOGRAPHING NOT PREJUDICIAL.

The provision for photographing the records in no sense prejudices Appellant, since photographing is a form of copying and copying is a necessary incident in the inspection of voluminous records.

The discussion of photographing and microfilming appears to have come up because of certain statements in the affidavits that O.P.S. personnel had suggested microfilming as a quick way of getting through with the records, clearly for the purpose of causing Appellant as little trouble as possible (Tr. 8, 24). It is obvious that there were no photographers in the courtroom for no one seemed to have understood what distinction, if any, existed between photographing, photostating, and microfilming. Actually all are photographic processes and it is impossible to find any logical basis for permitting one and not the other. The trial judge, obviously influenced, and properly so, by the analogies found in Rule 34 of the Federal Rules of Procedure permitted "copying or photographing" in the exact words of the Rule (Tr. 36).

Appellant recognizes, at pages 33 and 34 of its Brief, that copying and photographing are the same thing, and is driven by its own logic to argue that both are forbidden to the Government.

Section 705 (a) of the Defense Production Act of 1950 (U.S.C.A. 50 App. 2155 (a)) provides that:

"The President shall be entitled, . . . by regulation, subpoena, or otherwise, to obtain such information from, require such reports, and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony

of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act (said sections) and the regulations or orders issued thereunder . . . ”

Does not the wording “necessary or appropriate, in his discretion” apply to the means as well as the matter?

The records in question are quasi-public, required by statute to be kept. It is apparently Appellant’s position that the only way the Government can get a copy of such a document is by asking for it. If the request is refused, the Government’s agents may look, but they may not copy what they see. They must memorize the contents of voluminous files, must commit to memory long columns of figures.

If this be true, Appellant’s conclusion “Thus the statutory scheme is complete” is an understatement. If this be true, the Congress has perpetrated one of the most amazing blunders of all times, and the law is completely futile. It is hard to believe that such argument is seriously intended.

L. THERE WAS NO HARASSMENT OF APPELLANT.

It is more than a little difficult to understand Appellant’s argument at pages 41 and 44 of its Brief,

dealing with the supposed harassment of Appellant. The keynote is struck by the extraordinary statement that "It is appropriate that this court assure itself that Appellee has by its actions proved itself worthy of an enforcement order."

If this means anything it means that the United States must produce character references. We find neither statute nor rule defining the procedure for doing so.

The cases cited do not support Appellant's position. *Fleming v. Fossati*, (1947, Ore.), 177 P. (2d) 425, is a state case which invokes the probable cause theory which the Federal courts have refused to follow. (*Hagen v. Porter*, supra). Further, the Court did not refuse inspection, but merely remanded the case for determination of the facts. The Oregon Supreme Court apparently regarded the case as an injunction proceeding, and questioned the necessity for extraordinary relief. Such is not the situation in Federal court.

Appellant makes much of the fact that two agents spent ten days on the records, and got only as far as the base period and one subsequent month, whereas one of the attorneys reviewed the entire base period in two hours. Can it be that there were differences in both objective and thoroughness? O.P.S. investiga-

tors are not necessarily either lawyers or accountants. They have to feel their way in unfamiliar situations, but this does not mean that anyone is being harassed.

The argument concerning the time allowed by the Subpena is not covered by Appellant's Statement of Points (Tr. 102-105) and is not properly before the Court. Appellant's point "L" is directed to the court order and not to the Subpena. In any case the argument on this point is flimsy and without merit.

It is difficult to follow Appellant's reasoning in this whole section of its Brief (pages 41-44). The language of Colman's affidavit (Tr. 12-13) is cited as evidence of harassment. The language is not correctly quoted or summarized. The exact language (Tr. 12) is:

"That further check made of invoices for *a month* subsequent to the base period indicated consistent and a continued practice by the subject, West Side Ford Company, of charging in excess of maximum ceiling prices." (Emphasis supplied.)

Affiant does not say *what month*. If he means the month immediately following the base period, grammar demands that he say "*the month* subsequent to the base period" rather than "*a month*." It is silly to assume, as Appellant suggests, that Colman did a

useless thing when the plain meaning of his language clearly shows the opposite.

Appellee deplores the unnecessary heat of the argument culminating in the sentence:

“Such unwarranted prejudicial conduct should not be countenanced.” (Appellant’s Brief, 44).

There is nothing in the case to justify such an outburst.

In any event, as the Court aptly said in *Application of Compton*, (U.S.D.C. N.D. Texas) 101 F. Supp. 547, 549, which was a proceeding to enforce a Subpena Duces Tecum under the present Defense Production Act:

“Neither inconvenience, expense, nor *harassment* can defeat this right to make the investigation.” (Emphasis supplied).

M. NO CONSTITUTIONAL RIGHT OF APPELLANT HAS BEEN VIOLATED.

Convention demands that any Defendant who runs afoul of any recently created administrative agency shall invoke the Fourth and Fifth Amendments to the U. S. Constitution. This case is no exception.

Appellant’s constitutional arguments, as summarized in the Table of Contents of its Brief are:

- (1) "Both the Administrative Subpoena and the Enforcement Order are so vague that they authorize an unreasonable search and seizure in contravention of the Fourth Amendment." (Brief, Table of Contents, B 2).
- (2) "The Enforcement Order . . . denies Appellant the due process of law required by Fifth Amendment . . . by authorizing on-premises inspection of documents after Appellant was required to defend a motion for off-premises production of documents." (Brief, Table of Contents D and D 1).

These contentions will be treated in order.

(1) The Fourth Amendment.

Appellant's argument on this point is based upon a misreading of *Hale v. Henkel*, 201 U.S. 43, 50 L. Ed. 652, decided in 1906. All that the Court held was that Congress had not authorized inspection of the documents there in question. The Court said, at page 77 of the U.S. report, pages 666-7 of L. Ed.:

"Of course, in view of the power of Congress over interstate commerce, to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by Act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."

Since the constitutional question was thus clearly settled at least forty-six years ago, we have at most a statutory question. The records in this case are all quasi-public records, required by Section 705 (a) of

the Defense Production Act of 1950 as amended (U.S.C.A. 50 App., Sec. 2155 (a)), and by the Regulations and order already cited and quoted. *Bowles v. Insel*, 148 F. (2d) 91; *Bowles v. Glick Bros.*, 146 F. (2d) 566; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 90 L. Ed. 614; *U. S. v. Kempe* (U.S.D.C. N.D. Iowa) 59 F. Supp. 905.

Records so kept pursuant to statute and regulation are clearly public or quasi-public in character; and the constitutional guarantees protecting private papers have no application to them. *Wilson v. U. S.*, 221 U.S. 361, 55 L. Ed. 771.

(2) The Fifth Amendment.

We have already demonstrated above in Section III., J and K, that the District Court, far from exceeding its powers, failed to exercise them fully, to the advantage of Appellant and the possible disadvantage of Appellee. Appellant is in the position of one who attempts to invoke "due process" and "fair play" because he was charged with murder and convicted of manslaughter.

The judge was kind, considerate, toned down his Order to meet some of Appellant's suggestions. Appellant silently accepted the boon thus granted, now snaps at the hand which granted it.

“The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does not violate the due process clause even though it be erroneous in fact or law, or both. (Citing authorities) The proceeding involved here was in due form; the court had jurisdiction of the subject matter; and the state and the commissioner had notice and were heard. That satisfied in full measure the exactions of due process.”

State of Kansas v. Occidental Life Ins. Co., 95 F. (2d) 935, 937; certiorari denied 305 U.S. 603, 83 L. Ed. 383.

One who claims failure of due process must show first, that the Constitution has been violated, and second, that he has been prejudiced thereby. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 76 L. Ed. 1038.

Since neither element exists in this case, the argument need not be prolonged.

N. CUMULATIVE EFFECT NOT ERRONEOUS.

Since everything done by the agency was in order, and the trial Court acted within the limits of

its authority, the cumulative effect cannot be erroneous.

If we understand Appellant's argument at pages 45 and 46, it means that although each step taken in an administrative proceeding is legally correct, yet, because Appellant considers himself abused, the whole proceeding should go out of the window. We do not follow. No matter how many zeroes one adds or multiplies together, the result is still zero.

The quotation from Gellhorn at page 45 is eloquent. It may or may not be the law, but by its own terms it requires a showing of "vitiating unfairness" which is completely lacking here.

IV. CONCLUSION

We have read with care every report and other document cited in Appellant's Brief. We find nothing in any of them which, considered in context, supports Appellant's position. Appellee's case could, if necessary, be sustained without citation of any authority beyond those cited by Appellant.

Since everything done by the Office of Price Stabilization was done legally and properly, within the provisions of the applicable statutes and regulations, and since the Order of the District Court grant-

ed the United States a lesser degree of relief than the facts and pleadings warranted, there is no reversible error in this case.

Appellee, therefore, prays that the District Court's Order be affirmed, and that the case be remanded to the District Court for such further proceedings as may be necessary, and particularly for the fixing of a new time for inspection, since, by reason of the appeal, the original time limit has expired.

Respectfully submitted,

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U. S. District Attorney

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Attorney*



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vs.

UNITED STATES OF AMERICA,

Appellee.

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SUBPOENA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I. SUMMARY OF ARGUMENT

This appeal is based upon error of the court below in granting its Order Enforcing Administrative Subpoena dated April 16, 1952. If the subpoena was invalid, it was error to grant the enforcement order.

That order authorized production, inspection and photographing of records and documents not required to be kept under the Defense Production Act of 1950 and in any case necessarily immaterial and

irrelevant to any inquiry under the Act. Nor can relevancy and materiality be determined in the absence of any proper definition of scope and purpose of the investigation. The determination of scope and purpose in the instant case was by its terms inadequate and was not timely served upon Appellant.

The issue of materiality and relevance is always a matter for judicial determination, rather than for the exclusive determination of the Director of Price Stabilization as contended by Appellee.

The photographing of Appellant's records and documents is simply not permitted by the terms of the Act, whether or not it is prejudicial to Appellant. The previous conduct of the parties is a matter for the consideration of the Court. The effect of these errors is such that the Order Enforcing Administrative Subpoena dated April 16, 1952, should be vacated and enforcement of the administrative subpoena dated March 25, 1952, denied.

II. ARGUMENT

A. INTRODUCTION.

The administrative subpoena is not before the Court, but only the judgment and order of the District Court. *Cudmore v. Bowles* (C.A.D.C., 1944), 145 F.(2d) 697. Appellant desires specifically to state, however, that it predicates error of the Court below upon the granting of an enforcement order under the authority of the Defense Production Act

when the administrative subpoena was invalid and unlawfully issued *ab origine*. 50 App. USCA 2155 (a) provides for resort to a court for enforcement only in the case of contumacy by, or refusal to obey a subpoena served upon, Appellant. Clearly the power of the Court to issue the order depends upon the validity and legality of the prior administrative demand. If that demand was not properly made, then enforcement must be denied.

B. THE DISTRICT COURT ORDER ENFORCING ADMINISTRATIVE SUBPOENA DATED APRIL 16, 1952, AUTHORIZED INSPECTION OF DOCUMENTS NOT REQUIRED TO BE KEPT UNDER THE ACT AND NECESSARILY IRRELEVANT AND IMMATERIAL TO ANY INQUIRY UNDER THE ACT.

1. Current cost records are not relevant or material to any possible inquiry under the Act and Regulations.

Appellee has nowhere demonstrated in its brief that "repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery" are required by O.P.S. regulation to be maintained. Likewise, Appellee has failed to show that such records fall within the ambit of any proper inquiry under the Defense Production Act or regulations issued thereunder. This point deserves some elaboration

in order clearly to expose the approach of the O.P.S. to this question.

First, it is axiomatic that the Act is aimed at price control, not profit control. Second, it is apparent that the charge made by automobile dealers for preparation and delivery is customary and traditional. Both SR 5 to GCPR, 16 FR 1769, and CPR 83, 16 FR 10594, recognize this fact by specifically including such a charge in the ceiling price. Third, the ceiling established for such a charge by GCPR, SR 5 to GCPR, and CPR 83, in each case is based upon the *charge* made for the service during a base period. It should be noticed parenthetically that the legality of the arbitrary 5% limitation in CPR 83 is presently being tested in protest proceedings now pending before the Office of Price Stabilization. Regardless of the 5% limitation, however, the ceiling price is first based upon the base period *charge* made for the service. This being true, it is at once apparent that any inquiry as to the *cost* of that service to the dealer is beyond the scope of the Act and outside the jurisdiction of the O.P.S.

Appellee, however, raises the question of so-called "phantom" services. (Appellee's Brief, 12, 25.) That question is simply not presented in this proceeding. Appellee is attempting to justify an inquiry into profits under the guise of an inquiry into charges for services not rendered. All automobile dealers, including Appellant, prepare and condition new cars

for delivery. The O.P.S. has never challenged this fact, but evidently insists upon the right to control the profit margin on the service instead of the price. Appellant cannot agree that the O.P.S. has such untrammelled power under the Act.

Appellant invites the attention of the Court to Interpretation 2 of CPR 83, 17 FR 5117. That was an interpretation of the original version of CPR 83, and, although not in terms applicable to SR 5 to GCPR, is indicative of the view of the O.P.S. on the general subject of the preparation and conditioning charge. That interpretation conclusively establishes that the *charge* for preparation and conditioning during the base period is the basis of the ceiling price therefor except in the one situation covered by Section (4) thereof where the dealer cannot separate his base period charge from the total selling price of the automobile. There is no showing here that Appellant must resort to this Section to establish its ceiling price for preparation and conditioning, and, in any event, the relevant cost period extends only through February 24, 1951.

Appellant again submits that the cost records demanded are completely irrelevant and immaterial to this inquiry and are beyond the scope of the regulations involved herein.

Appellant is confused by Appellee's discussion of the Capehart Amendment (Appellee's Brief 11, 12). Appellant originally referred to the Capehart

Amendment, 50 App. USCA 2102(d) (4), to support the proposition that any inquiry into costs beyond June 24, 1951, is outside the scope of *any possible proper inquiry* under the Act. (Appellant's Brief, 27). No section of the Act refers to costs at any time subsequent to that date. However, as Appellee points out, this provision of the Act contemplates an application and showing of costs by the affected seller, and Appellant has not stated or suggested that it has applied for such an adjustment. This being true, Appellant can only assume that Appellee *concedes* that the Capehart Amendment does not justify this inquiry into costs. If so, Appellant willingly acquiesces.

2. Current cost records are not required to be kept under the Act and Regulations.

Appellee itself "baldly" states, at page 25 of Appellee's Brief, that such cost records ". . . are specified as records required to be kept under CPR 83, Section 10(c) and (e). Section 16 of the GCPR requires keeping and preservation of records as to all commodities and services." Such is not the case. Section 10 of CPR 83 requires only that the customer invoice show the *charge* made for each item specified in that Section. Section 16 of GCPR requires that certain *base period* cost records be maintained, but nowhere requires that any current cost records be maintained.

C. MATERIALITY AND RELEVANCY ARE ALWAYS MATTERS FOR JUDICIAL DETERMINATION.

Appellee takes the position (Appellee's Brief, 13) that:

"It is the prerogative of the District Enforcement Officer to determine the extent and relevancy of the data to be inspected."

Appellant has argued at pp 18-22 of its Brief that the issues of relevance and materiality are always factual issues for judicial determination, and has cited numerous authorities, especially *Bowles v. Cherokee Textile Mills*, (D.C.E.D. Tenn, 1945), 61 F. Supp. 584, to sustain its contention. Appellant reaffirms its stand upon this issue upon the argument made and authorities cited in its Brief.

It remains only to consider the authorities cited by Appellee. The determination to which reference was made in *Benenson Realty Corp. v. Porter*, (E.C.A., 1946) 158 F.(2d) 163, was a rent order; the case did not in any way deal with the subpoena process. The quotation from *Bowles v. Abendroth* (C.A. 9, 1945), 151 F.(2d) 407 is too brief to give its full import. The fuller quotation follows:

"We think the courts may not substitute their judgment of the necessity or desirability of an investigation for that of the agency made responsible by Congress for the policing of war-time prices. Cf. *Bowles v. Glick Bros. Lumber Co.*, 9 Cir., 146 F.(2d) 566, 570, 571. *Enforcement may, of course, be declined if the administrative subpoena is vague or unreasonably*

burdensome, Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652, or if the proposed inquiry is not authorized by statute, Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253; Cudahy Packing Co. v. Holland, 315 U. S. 357, 62 S. Ct. 651, 86 L. Ed. 895. * * *” (Italics supplied)

Appellee supplies the key to the whole problem in its quotation from *Creedon v. Warner Holding Co.*, (CA 8, 1947), 162 F.(2d) 115:

“It requires the presence of unusual and prejudicial circumstances to show that a request of the Administrator to inspect *relevant and material* books and papers is unreasonable.” (Italics supplied)

With this Appellant wholeheartedly agrees. The quotation assumes, first of all, that the books and papers are *relevant* and *material*. Once this is found, of course unusual and prejudicial circumstances must be shown if the request to inspect is to be deemed unreasonable. But the initial requirement remains, that the books and papers be relevant and material; and this Appellee has clearly indicated in its choice of authority.

The case is of further interest for its lucid statement at p. 119 of the requirements for denial of enforcement of an inspection requirement:

“To determine whether the denial of enforcement of the Inspection Requirement was arbitrary *the reviewing court must inquire* whether the Act of Congress under which the Administrator purports to act is constitutional; whether, if so, the Act authorizes an inspection of private books and records; *whether the facts sought to be investigated are relevant*; and

whether the request for inspection is reasonable. * * *” (Italics supplied)

Appellee would take *Bowles v. West Poultry & Dairy Products Co.*, (C.A. 9, 1946), 153 F.(2d) 32, as a model example of the Court’s powers of inquiry. However, the decision therein was necessarily limited by the issues raised, and, as the Court stated:

“The sole ground of appellee’s refusal of the inspection of its records was the claimed invalidity of the regulation, the continued violation of which was admitted.”

How, then, could the court rule on the issues of materiality and relevancy? But in the instant case, Appellant raised all issues, including the issues of materiality and relevancy, by its Objections and Answer to Motion Requiring Respondent to Appear, Testify and Produce Certain Documents, (Tr 13), placing the issue squarely before the Court. Nor, of course, does Appellant admit any violations.

Appellee relies on the presumption of regularity of proceedings of administrative agencies, cited in the *Northwest Poultry* case, *supra*. But, in that case, it has been shown, there was objection not to the acts of the Administrator, but to the validity of the regulation involved. Once the court held the regulation valid, the presumption of regularity of the Administrator’s acts followed, since there was nothing in the record to rebut that presumption.

In the present case, the Objections (Tr 13) raised by Appellant squarely confront the presumption.

Evidence, in the form of affidavits, was adduced in support of the Objections. The case was, therefore, before the Court on evidence; the presumption ceased to operate.

It therefore appears that Appellee has nowhere supported its contention that relevance and materiality are the sole province of the Director. The authority to the contrary, cited by Appellant, stands unchallenged, so far as Appellee's Brief is concerned. Appellant once more submits that there was not, and could not in the nature of things, have been any determination by the District Court of the relevance and materiality of the information sought; and that therefore, the Order Enforcing Administrative Subpoena dated April 16, 1952, should be vacated.

D. AN ADEQUATE DEFINITION OF SCOPE AND PURPOSE MUST BE MADE AND SERVED UPON APPELLANT.

Implicit in Appellee's Brief is the belief that a definition of scope and purpose has no function with reference to the subject of the investigation, and was created only for the administrative convenience of the O.P.S. Appellant has set forth in its Brief its belief that the function of the determination of scope and purpose is to apprise the subject of the investigation of its scope and purpose so that he may obey the subpoena.

Appellee states correctly that, under the Emergency Price Control Act of 1942, 50 App. USCA 922 *et seq*, there was no requirement of a showing of probable cause before enforcement of an administrative subpoena. *Hagen v. Porter*, (C.A. 9, 1946). 156 F.(2d) 362. The reason is clear. A careful study of that legislation shows no limitation upon the subpoena power which was granted in aid of "such studies and investigation, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him * * * in the administration and enforcement of this Act." 50 App. USCA 922(a).

There was, in short, no requirement of the definition of scope and purpose of the subpoena proceeding, such as is found at 50 App. USCA 2155(a).

A comparison of the two Acts shows a clear intent on the part of Congress to limit the exercise of the subpoena power under the current Act; and this intent should be considered in the light of those cases which held there was no need for a showing of probable cause in an enforcement proceeding under the 1942 Act.

Of what avail is the definition of scope and purpose if it reposes in the darkness of the Director's files? What purpose can then have been served by this express statutory requirement? Why should any definition be made, if it is as broad as the scope of the appellant's business?

Appellant once more submits that the purpose of this requirement is to assure that the contemplated investigation is authorized by the Act, and to enable the subject of the investigation to comply with the demands made upon him.

Appellee, referring to the purported definition of scope and purpose, states (Appellee's Brief, p. 18) :

"It is difficult to imagine what more could have been put into the document unless the results of the investigation had been known in advance."

This is precisely the vice of the attempted definition. It in no way defines. Appellant still does not know the real object of this investigation. It has simply been commanded to open all records, whether or not they possibly pertain to price enforcement, to inspection by the O.P.S. Appellant once more affirms the interpretation of the requirement of scope and purpose set forth in its Brief, and once more states that adequate definition of scope and purpose will necessarily govern the vital issues of materiality and relevancy.

E. PHOTOGRAPHING RECORDS IS NOT PERMITTED BY THE ACT, WHETHER OR NOT PREJUDICIAL.

Appellee's argument with regard to the provision in the lower court's order permitting photographing is contained in the heading "K. PHOTOGRAPHING NOT PREJUDICIAL." (Appellee's Brief, 29). The

amazing contention of the O.P.S. is that it may do an act not authorized by statute so long as a different act accomplishing the same end is authorized by statute, on the ground that no one is prejudiced thereby. The Defense Production Act permits the O.P.S. to obtain certain information by following certain procedures. 50 App. USCA 2155(a). The O.P.S. may in a proper case subpoena documents and refer to them and obtain information from them for lawful purposes. The Act *does not*, however, authorize the copying or photographing of books and records. The fact that Rule 34 of the Federal Rules of Civil Procedure permits copying or photographing of evidentiary writings in a civil lawsuit is completely irrelevant.

Appellant sympathizes with the O.P.S. in its apparent inability to obtain that power from Congress, but must point out that the O.P.S. is not in such dire straits as are complained of in Appellee's Brief at page 31. Obviously by following the proper procedure the O.P.S. can obtain all the information it needs upon which to determine compliance or base an overcharge action in which the evidence for trial can be obtained by copying or photographing under Rule 34.

It seems fair to remark that a denial by Congress to a temporary administrative agency of the power to microfilm business records and accounts wholesale merely to determine compliance with its regula-

tions can hardly be denominated, as Appellee suggests, "one of the most amazing blunders of all times."

F. THE COURT SHOULD CONSIDER THE PREVIOUS CONDUCT OF THE PARTIES.

It was and is the purpose of Appellant to bring to the attention of the Court the facts illustrating the previous dealings of the parties. As set forth in its Brief (pp. 42-43), Appellant had offered full cooperation to the O.P.S. and had permitted extensive investigation of its books and records, furnishing office space to agents of the O.P.S. for prolonged periods. It was only when the demand was made to remove and microfilm records that Appellant resisted. Such a fact is worthy of the Court's notice.

Appellant leaves to the Court to determine the meaning of the language of Colman, in his affidavit, charging violation of ceiling prices. (Tr 12).

The Court should certainly consider these elements in determining the merit of Appellee's application for enforcement.

III. CONCLUSION

By a fine display of mathematical logic Appellee ridicules the prejudicial cumulative effect of a number of individual errors each of which might not by itself be a ground for reversal. Fortunately the judicial process is not bound by the inflexible rules

of arithmetic but is instead a dynamic institution well equipped to weigh the intangible factors with the tangible in adjusting social conflicts. Appellee's lack of understanding of this point is consistent with the fact that administrative agencies are continually embroiled in litigation over procedural defects and arbitrary action. "Almost" fair play never has and never will be equated with fair play under the Fifth Amendment.

Running through Appellee's entire Brief is the underlying assumption that an individual should not assert his legal rights if they interfere with administrative convenience. Appellee seems to imply that the procedural rights of the individual are subservient to the substantive goals of the price stabilization program, and that Appellant should not stand on its procedural rights if the O.P.S. means well. Thus, Appellee expresses amazement that this proceeding is before this Court if Appellant would accede to a properly instituted and conducted inspection (Appellee's Brief, 22), cannot believe that Appellant's arguments are seriously intended (Appellee's Brief, 31), and accuses Congress of blunders and retrogressive thinking (Appellee's Brief, 29, 31).

This case is before the Court solely because the O.P.S. proceeded unlawfully toward a lawful objective. Appellant, as the subject of this procedure, had a right to and did resist such action in Court.

Such resistance is the right of every citizen, and should not be taken lightly by the United States or any of its agencies or officials.

If Appellant has not yielded in its position, neither has the O.P.S. offered or attempted to correct its methods. This being the case, it is left to this Court to fix the limits of the administrative authority.

Appellant, therefore, prays that the Order Enforcing Administrative Subpoena, of April 16, 1952, be vacated and set aside; and that enforcement of the administrative subpoena, of March 26, 1952, be denied.

Respectfully submitted,

BOGLE, BOGLE & GATES

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No. 13393

United States
Court of Appeals
for the Ninth Circuit.

FRED G. STEVENOT, Trustee of Coastal Ply-
wood & Timber Company, a Corporation,
Debtor,

Appellant,

vs.

J. W. NORBERG, NILS G. MATSON, MER-
RITT W. TALLMAN, MILO F. BARN-
HART, ROLAND C. ZIMMERMANN,
FLOYD C. JACKSON, GLADYS M. ZIM-
MERMANN, EDWIN H. JASMANN, FRANK
SUTTON, GEORGE F. SCOTT and JOHN
E. VICK,

Appellees.

Transcript of Record

Appeals from the United States District Court
Northern District of California,
Northern Division.



No. 13393

United States
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for the Ninth Circuit.

FRED G. STEVENOT, Trustee of Coastal Ply-
wood & Timber Company, a Corporation,
Debtor,

Appellant,

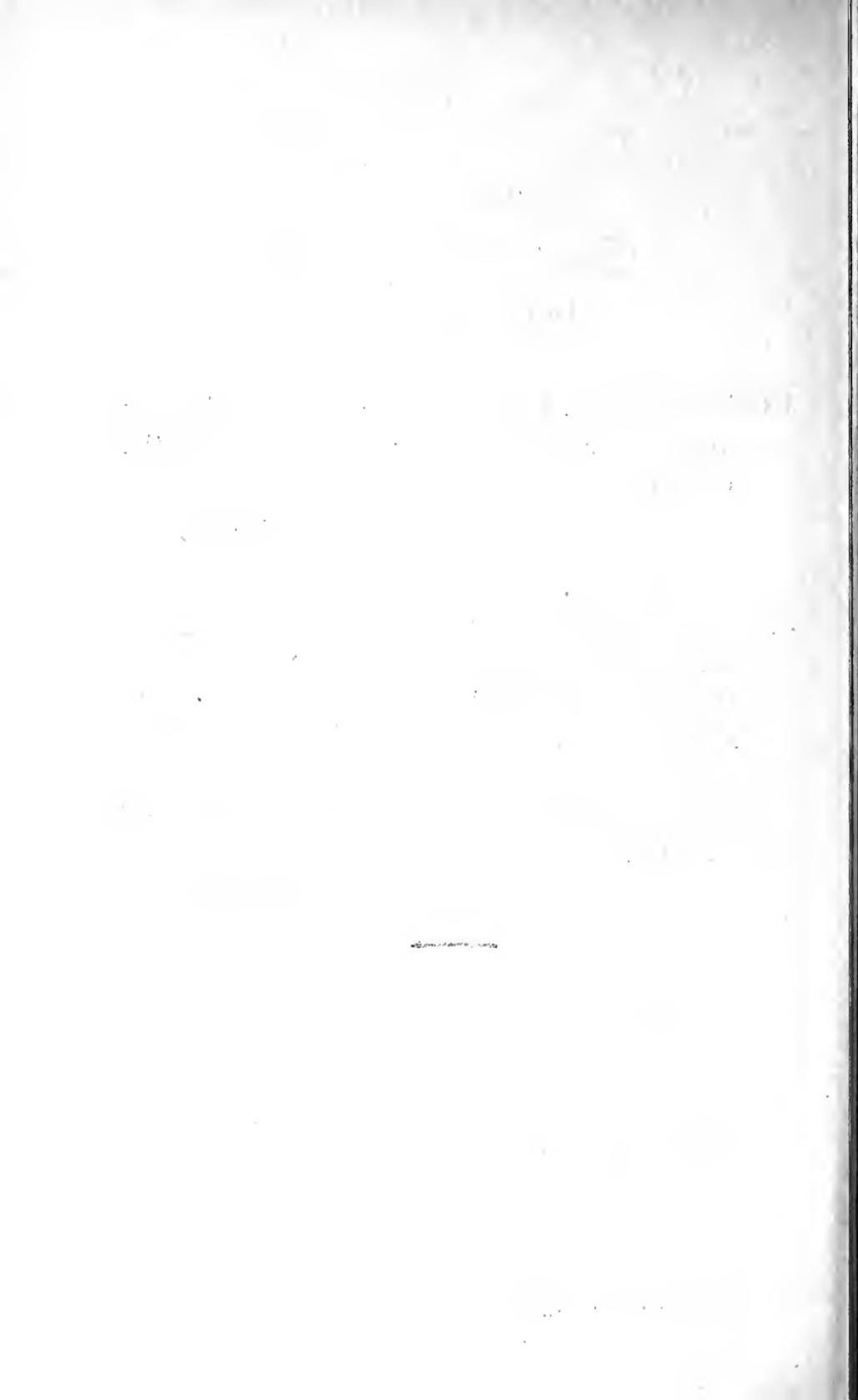
vs.

J. W. NORBERG, **NILS G. MATSON**, **MER-
RITT W. TALLMAN**, **MILO F. BARN-
HART**, **ROLAND C. ZIMMERMANN**,
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Appeals from the United States District Court
Northern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 350

LECTURE 10

STATISTICAL MECHANICS

ENTROPY

REVIEW

ENTROPY

In the District Court of the United States for
the Northern District of California, Northern
Division

No. 12223

In the Matter of:

COASTAL PLYWOOD & TIMBER COMPANY,
a Corporation,

Debtor.

ORDER APPOINTING TRUSTEE AND PRE-
SCRIBING POWERS AND DUTIES

A petition by Karl M. Fickes, Carl E. Anderson and Leonhard G. Fuches for the reorganization of the above-named debtor under the provisions of Chapter X of the Bankruptcy Act having been duly filed herein, and the court after hearing having determined the issues presented by said petition and the answer thereto filed herein by said debtor, and having made its order on October 24, 1951, approving said petition, and directing that proceedings be had herein in accordance with the provisions of Chapter X of the Bankruptcy Act; and it appearing to the court from the allegations of the petition and of the said answer of said debtor, that the aggregate liabilities of said debtor, liquidated as to amount and not contingent as to liability, are in excess of \$250,000.00, and it further appearing to the court that this is a proper case for the appointment of a trustee under the provisions of Chapter X of the Bankruptcy Act, and good cause appearing therefor;

It Is Hereby Ordered that Fred G. Stevenot, Esq., be and he is hereby appointed trustee of the estate of the above-named debtor, Coastal Plywood & Timber Company, a corporation, including all and singular the assets and estate of the above-named debtor of whatever kind and character and wherever situated, and the said trustee is hereby directed to give and file with the clerk of this court within ten days from and after the entry of this order, a surety company bond in the sum of \$25,000.00, to be approved by the judge, and conditioned to be void if said trustee shall well and truly perform the duties of his office and duly and faithfully account to whom it may concern for all monies, properties and things whatsoever that may come into his hands by virtue of his office, and otherwise perform all things that he shall be directed by the court or judge to do; and said trustee, upon giving and filing said bond, shall be vested not only with all the powers conferred on a trustee under Chapter X of the Bankruptcy Act, but with all the powers of a receiver in equity not inconsistent with the provisions of Chapter X of the Bankruptcy Act, subject always to the direction and control of the judge;

It Is Further Hereby Ordered that the trustee so appointed shall within 15 days after the entry of this order cause a notice to be mailed to each of the creditors of the debtor at his last known post office address, to each of the stockholders of the debtor as the same may appear on the books of the debtor, to any indenture trustees, and to the Securi-

ties and Exchange Commission, and to cause publication of such notice to be made at least once a week for two successive weeks in a newspaper published and having general circulation in the County of Sonoma, State of California, to the effect that a hearing will be held before the judge at the courtroom of the above-entitled court located in the Post Office Building, 9th and I Streets, Sacramento, California, on the 3rd day of December, 1951, at 10 o'clock a.m., to hear any objections that might be made to the retention in office of said trustee;

It Is Further Hereby Ordered that the trustee appointed herein be and he is hereby authorized and directed, pending further order herein, to conduct and operate the business of the debtor and to manage, maintain and keep in proper condition and repair the assets, properties and business of the debtor, wherever situated; to employ and discharge, and to fix, subject to the approval of the court, the rate of compensation of all officers, managers, superintendents, agents and employees; to collect and receive the income, rents, revenues, tolls, issues and profits of said properties and business, and to collect all outstanding accounts and all dividends and interest or securities belonging to it;

It Is Further Hereby Ordered that said trustee be and he is hereby authorized, in his discretion, from time to time until further order herein, out of funds now or hereafter coming into his hands, to pay all necessary current expenses of the business of said debtor;

It Is Further Hereby Ordered that, until the

trustee appointed herein shall have qualified, the officers of the debtor may continue to sign checks drawn on any bank accounts of the debtor in the usual manner, and in the ordinary course of business;

It Is Further Hereby Ordered that, at the earliest date practicable and not later than December 15, 1951, the trustee shall prepare and file with the clerk of this court a report and statement of the assets and liabilities and financial condition of the debtor as of October 1, 1951, together with his report as to the operation of and the desirability of the continuance of the business of the debtor; the trustee shall mail a summary of said report and statement not later than December 15, 1951, to the creditors, stockholders, indenture trustees of the debtor, and to the Securities and Exchange Commission;

It Is Further Hereby Ordered that the trustee shall prepare and file with the clerk of this court a regular quarterly report and statement of the assets and liabilities of the debtor as of the close of business on the last day of the preceding quarter year, together with a summary statement of the revenues and expenses of the debtor for the preceding quarter year; the trustee shall also prepare and file an annual statement and report of the assets and liabilities of the debtor as of the close of business of the last day of the calendar year, together with a statement of the revenues and expenses of the debtor for the preceding calendar year and shall mail summaries of said annual

statement and report to the creditors, stockholders, indenture trustees, and to the Securities and Exchange Commission;

It Is Further Hereby Ordered that not later than December 15, 1951, the said trustee shall prepare and file in court a list of the creditors of each class, showing the amounts and character of their claims and securities, and, so far as known, the name and the post office address or place of business of each creditor; and a list of the debtor's stockholders of each class, showing the number and kind of shares registered in the name of each stockholder and the last known post office address or place of business of each stockholder;

It Is Further Hereby Ordered that, pending further order of this court, the trustee shall, and he is hereby authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary, in his judgment, for the recovery or proper protection of the properties or rights of the debtor, and, subject to the approval of the court, to make settlement of any thereof; and likewise to defend any actions, claims, proceedings or suits now pending against the debtor or which may hereafter be brought in any court or before any officer, department, commissioner or tribunal to which the trustee or debtor are or shall be a party.

It Is Further Hereby Ordered that the court reserves jurisdiction to enter any additional order or orders herein from time to time as to the judge

may seem proper, including any orders amplifying, extending, or otherwise limiting or modifying this order, as may be consistent with or in pursuance of the provisions of Chapter X of the Bankruptcy Act.

Dated this 1st day of November, 1951.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed November 1, 1951.

[Title of District Court and Cause.]

ORDER APPROVING RETENTION OF
TRUSTEE IN OFFICE

At a Court of Bankruptcy, held in and for the Northern District of California, Northern Division, at Sacramento, on the 21st day of December, 1951, before Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, Northern Division.

This cause having come on regularly to be heard on the 21st day of December, 1951, pursuant to the provisions of Section 161 of the Bankruptcy Act and pursuant to the provisions of the "Order Appointing Trustee and Prescribing Powers and Duties" entered herein on November 1, 1951, as amended; and upon the affidavit of Fred G. Stevenot, Trustee of the Debtor's Estate appointed by said Order, sworn to December 20, 1951, showing

the giving of notice as required by said Order; and said Trustee having filed the bond required of him by said Order; and said Trustee having shown to the satisfaction of the Court that he is qualified and disinterested as provided in Chapter X of the Bankruptcy Act; and full opportunity having been afforded to all persons to make objections to the retention in office of said Trustee, and no objections having been made; and due consideration having been given,

It Is Hereby Ordered:

1. That due and proper notice of said hearing has been given in accordance with the provisions of Section 161 of the Bankruptcy Act and of said "Order Appointing Trustee and Prescribing Powers and Duties," as amended;

2. That said Fred G. Stevenot, Trustee of the Debtor's Estate, is properly qualified and is disinterested as provided in Chapter X of the Bankruptcy Act, and that said Trustee be and he hereby is retained in office.

Done in Open Court this day of December, 1951.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed December 21, 1951.

[Title of District Court and Cause.]

PETITION FOR REINSTATEMENT OF
EMPLOYEES WITH BACK PAY

The petition of J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott, and John E. Vick, respectfully represents:

I.

Each petitioner is and for two or more years last past has been a holder of one share of Class "A" capital stock of Coastal Plywood & Timber Company, a corporation organized and existing under the laws of the State of Nevada and having its office and principal place of business at Cloverdale, California, the Debtor in the proceedings; and prior to December 28, 1951, each petitioner had been regularly and continuously employed by said company in its plant at Cloverdale, California (except during plant or departmental shut-downs) for periods of time varying from two years and four months to five years and three months. Each petitioner resides in Cloverdale, California, and all of them, except Tallman and Gladys M. Zimmermann, owns or is now purchasing a home in said town; each petitioner, except Scott and Tallman, is a creditor of said company in amounts varying from \$200.00 to \$1,650.00 each and representing moneys loaned by them to said company. Petitioner

Norberg is president and a director, petitioner Barnhart is vice-president and a director, and petitioner Jackson is a director of said company.

II.

On December 28, 1951, without prior warning, petitioners were informed that they were "laid off" effective "as of the close of the work day, December 28, 1951," and each petitioner has been continuously unemployed by said company ever since. The said Cloverdale plant has continued its normal operations since December 28, 1951, and petitioners are informed and believe and upon such information and belief allege that each of them was in fact discharged as an employee of said company on December 28, 1951, and that each of them has since been replaced by another employee.

III.

Prior to the commencement of their respective employments by said company, each petitioner was a non-resident of Cloverdale, California, and each petitioner was induced to move his residence and to accept and continue employment with said company by its plan of identifying the **management** personnel and employees with Class "A" stock ownership, which plan is referred to in Articles IV and IX of the Amended Articles of Incorporation of said company, as amended September 9, 1947 (which are set forth on the reverse side of the stock certificate issued to and held by each petitioner), and also contained in Articles III, IV and

V of the Amended Bylaws of said company, as amended September 9, 1947.

Said provisions of the Articles and Bylaws were intended to afford each petitioner job security and job tenure as employees of said company and constitute valid and binding agreements between said company and each petitioner, in reliance upon which agreements each petitioner paid \$2,500.00 or \$3,500.00 for his or her share of stock, accepted employment with said company and has since continued to work as an employee of said company. The layoff or discharge of your petitioners on December 28, 1951, constituted a breach of and a violation of their contracts of employment with said company as contained in said provisions of its Articles and Bylaws.

Petitioners are informed and believe and upon such information and belief allege that the said layoff or discharge of petitioners was ordered by the manager of said Cloverdale plant, Martin F. Dyke, acting upon the prior authorization of Fred G. Stevenot, the Trustee appointed in these proceedings.

No reason for the said layoff or discharge, as the fact may be, has been given to any petitioner by said manager or said Trustee. Petitioners are informed and believe and upon such information and belief allege that on or about January 8, 1952, their attorney herein, Pembroke Gochnauer, called upon said Trustee, Fred G. Stevenot, and inquired as to whether (1) petitioners had been in fact laid off or discharged, and (2) as to the reason for such

action; and that said Trustee informed said attorney that petitioners had been discharged rather than laid off, and that he had authorized said Dyke to take such action because "their continued employment would not be for the best interests of the company"; and that on January 21, 1952, petitioners' said attorney held a conference with Messrs. Sterling Carr and Walter G. Olson, attorneys for said Trustee, and Webster Clark, of the firm of Rogers and Clark, attorneys for said Debtor, wherein petitioners' said attorney requested the said attorneys for the Trustee to ascertain the reason for the discharge of petitioners, and that thereafter to wit, on the 25th day of January, 1952, said Carr informed petitioners' said attorney that petitioners had been discharged because they were "trouble makers, and the company had gotten along much better without them." Petitioners have attempted through their said attorney to obtain the reinstatement of petitioners as employees of said company through said Stevenot, as Trustee, and later through said attorneys for said Stevenot, as Trustee, but without success, and the said attorneys for said Trustee have informed the said attorney for petitioners that petitioners should proceed to present their case to this court.

Prior to December 28, 1951, none of the petitioners had ever been warned or told by any representative of the management of said company that his or her work performance was improper or unsatisfactory, but, on the contrary, petitioners have been informed by their immediate supervisors

from time to time that their work performance was satisfactory. Petitioners know of no failure or refusal on the part of any one of them to properly perform each and every task assigned to them by the management of said company.

Petitioners are informed and believe and upon such information and belief allege that the reasons they were laid off or discharged on December 28, 1951, are as follows:

1. Petitioners in their capacities as stockholders and/or directors and/or officers of said company have from time to time since said Dyke became the manager of said company and particularly since March, 1950, advocated the payment of interest and installments on the loans to said company by the Bank of America and the RFC, which payments the said Dyke has failed to make.

2. From time to time since the said company, under the management of said Dyke, has failed to meet its financial obligations, petitioners have undertaken individually to find a purchaser or purchasers for their respective shares of stock.

3. Prior to July 1, 1951, petitioners, together with other shareholders, including Nels Sundeen and Dewey Jones, who are directors of said company, executed agreements with one L. M. Hampton, whereby petitioners have given said Hampton options to purchase their stock at a price of \$7,000.00 per share. Petitioners actively and openly advocated the execution of said option agreements

with said Hampton by other shareholders and are in favor of amending the Articles of Incorporation of said company to permit the ultimate sale of their stock to Hampton and the director petitioners have taken steps toward that end. Said Dyke has at all times opposed the execution of said option agreements with said Hampton and has advised shareholders to refuse to execute the same.

4. As a result of the reorganization proceedings against said company and the orders of this court therein, the board of directors of said company and the officers of said company no longer have any supervision or control over the activities of said Dyke, including his action in laying off or discharging petitioners.

5. Petitioners have been discharged solely because of their activities in respect to their statutory corporate rights as shareholders and/or officers and/or directors of said corporation, and in this connection they aver: petitioners were the only employees of said company who were laid off or discharged as aforesaid. No employees who have not optioned their stock to said Hampton were included in said layoff or discharge. There are nine members of the board of directors of said company, of which directors Norberg, Barnhart, Jackson, Sundeen, and Dewey Jones constitute a majority, and petitioner directors Norberg, Barnhart and Jackson constitute the only majority directors who were then still in the employ of said company. The layoff or discharge of petitioners by

reason of (1) the position of petitioners Norberg and Barnhart, as president and vice-president, respectively, (2) of petitioners Norberg, Barnhart and Jackson, as members of the board of directors of said company, (3) of each petitioner as a member of the group of stockholders who have executed said option agreements with said Hampton, and (4) of each petitioner as an advocate of the execution of said option agreements with said Hampton and of the amendment of the Articles of said company to permit the ultimate sale of their stock to said Hampton, was intended and designed to discourage the shareholders of said company from hereafter approving any plan or plans for the reorganization of said company which may hereafter be proposed by or supported by said Hampton or petitioners and offered to the shareholders of said company for ratification.

6. Under the provisions of Article IX of the Articles of Incorporation of said company, as amended September 9, 1947, and as further amended on or about May 31, 1950, the board of directors of said company on behalf of said company is given the sole and exclusive option to purchase from any holder of stock "who shall, voluntarily or involuntarily, cease to be employed by the corporation by reason of discharge, retirement, resignation, disability or any other cause whatsoever, the shares of stock of such holder at the bona fide market value, as hereinafter defined, for a period of sixty days from such * * * cessation of employment," and said

layoff or discharge of petitioners may have been in furtherance of an attempt by the said Dyke to terminate petitioners' ownership of their shares in said company and to thereby deprive them of the advantages of their said option agreements with the said Hampton and to hinder and obstruct any plan of reorganization which may hereafter be proposed on the basis of the option agreements now held by the said Hampton.

7. Said Dyke, as manager, and said Stevenot, as Trustee, have caused petitioners to be laid off or discharged in reliance upon the assumption that an amendment to the bylaws of said company which was adopted on September 10, 1950, by a majority of 12 votes at a shareholders' meeting of said company, whereby the provisions of said Articles III, IV and V of said Bylaws were purportedly eliminated, had the effect of abrogating or impairing the said company's obligations under its contracts of employment with petitioners, whereas, in fact, and in truth, the purposes for said amendments were represented to the shareholders, including petitioners, to be necessary in order for the company to continue in effect its loans from the Bank of America and the RFC and were only intended (a) to give the manager greater power with respect to the day-to-day management of said company; (b) to permit the manager of said company to become a stockholder therein; and (c) to permit the establishment of higher rates of pay for the qualified employees of said company who were also

stockholders therein; that said amendments to the Bylaws were never represented to accomplish nor intended to accomplish an abrogation or impairment of the job security and tenure provisions of the contracts of employment between said company and your petitioners; and said job security and job tenure provisions of said contracts of employment could not lawfully be abrogated nor impaired by reason of the provisions of the Constitution of the United States and the Constitution of the State of California.

Wherefore, petitioners pray that each of your petitioners be reinstated as an employee of said company in the position held by him or her on the 28th day of December, 1951; that each petitioner be reimbursed in the amount heretofore or hereafter lost as a result of his or her layoff or discharge; that said company be ordered to cease and desist from discriminating against petitioners as to any term or condition of their future employment by reason of any action heretofore or hereafter taken by them or any of them as a shareholder, officer or director of said company in the exercise of their statutory corporate functions as such; and for such other and further relief as may be meet in the premises.

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 9, 1952.

[Title of District Court and Cause.]

MOTION OF FRED G. STEVENOT, TRUSTEE
OF DEBTOR, ABOVE NAMED, TO DIS-
MISS PETITION FOR REINSTATEMENT
OF EMPLOYEES WITH BACK PAY AND,
IN THE EVENT OF THE DENIAL OF
ALL OF SAID MOTIONS, THE ANSWER
OF SAID TRUSTEE TO SAID PETITION
FOR REINSTATEMENT

Now comes Fred G. Stevenot, Trustee of Debtor above named, and moves the above-entitled Court to dismiss said Petition for Reinstatement of Employees With Back Pay, upon the following grounds, to wit:

1. The above-entitled Court has no jurisdiction of these proceedings for reinstatement or by reason of any of the things or facts set forth in said petition for reinstatement.

2. That said petition for reinstatement does not state facts sufficient to constitute a cause of action in favor of said petitioners or any of them and against said Trustee.

3. That said Fred G. Stevenot as such Trustee was not a party to said alleged contracts of employment set forth in said petition.

4. That if said contracts alleged in said petition were valid, the same, and each of them, were rejected by said Trustee on or about the 28th day of December, 1951.

5. The present proceeding and said petition for reinstatement are an attempt by said petitioners to specifically enforce the alleged contracts for personal services;

In support of said motions there is attached hereto and made a part hereof an affidavit of Fred G. Stevenot, Trustee in the above-entitled matter.

Said motions will be made upon this Motion and upon oral and documentary evidence to be introduced on the hearing of said motion and upon all the papers, records and files herein.

In the Event said motions to dismiss should all be denied by the above-entitled Court, and without in any manner waiving or withdrawing any of said grounds to dismiss and including them in the following answer, said Fred G. Stevenot as such Trustee files this his answer to said petition for reinstatement as follows, to wit:

I.

Said Trustee is without sufficient information or belief to enable him to answer the following portions of said petition for reinstatement and, basing his denial upon said ground, denies for said lack of information and belief the following portions of said petition for reinstatement:

(a) Beginning with the word "Each," page 1, line 24, down to and including the word "company," page 2, line 5;

(b) Commencing with the word "Prior," page 2, line 18, down to and including the word "company," page 3, line 1;

(c) Commencing with the word "Prior," page

3, line 32, down to and including the word "company," page 4, line 6;

(d) Commencing with the word "Petitioners," page 4, line 10, down to and including the word "same," page 4, line 30;

(e) Commencing with the word "No," page 5, line 8, down to and including the word "discharge," page 5, line 9.

II.

Said Respondent Trustee denies the following allegations of said petition for reinstatement and each and every part of each and every one of said allegations, to wit:

(a) Commencing with the word "and," page 2, line 29, down to and including the word "petitioner," page 2, line 31;

(b) Commencing with the word "The," page 3, line 2, down to and including the word "Bylaws," page 3, line 4;

(c) Commencing with the word "No," page 3, line 9, down to and including the word "Trustee," page 3, line 10;

(d) Commencing with the word "Petitioners," page 5, line 4, down to and including the word "corporation," page 5, line 6;

(e) Commencing with the last word "The," page 5, line 13, down to and including the word "ratification," page 5, line 25;

(f) Commencing with the word "may," page 6, line 2, down to and including the word "petitioners," page 6, line 14.

Said Trustee further denies that petitioners were

discharged for any or all of the reasons specified in Paragraph III of said petition.

And Further Answering said petition for reinstatement, said Trustee alleges:

That the alleged contract of employment contained in Articles III, IV and V of the Bylaws of the Debtor was, by Article VIII of said Bylaws, at all times subject to amendment by majority vote of the Class "A" Stockholders of the Debtor; that on the 10th day of September, 1950, said Bylaws were amended so as to eliminate therefrom all provisions for job security and job tenure of employees;

That at all times since the 10th day of September, 1950, Section 7 of Article III of said Bylaws has provided as follows, to wit:

"Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation."

That said Dyke referred to in said petition was on said 28th day of December, 1951, and now is, the General Manager of said Debtor and employed by this answering Trustee; that said notice of dismissal given said petitioners on said 28th day of

December, 1951, was given by said Dyke as said General Manager pursuant to and in accordance with said section of said Bylaws of said Debtor; That said notice was given with the prior approval and authorization of said Trustee.

Wherefore, said Trustee respectfully prays:

1. That said petition for reinstatement on file herein be denied.

2. For such other and further relief as to this Honorable Court shall seem fit and proper.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON.

By /s/ STERLING CARR,

/s/ STERLING CARR,

Attorneys for Said Trustee.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO DISMISS PETITION FOR REINSTATEMENT OF EMPLOYEES WITH BACK PAY

I.

That said petition for reinstatement does not state facts sufficient to constitute a cause of action.

See Section 7 of the Amended Bylaws passed in September, 1950, wherein the General Manager of Debtor is given full authority to employ and discharge at his discretion all employees.

Irrespective of the provisions of the original Articles of Incorporation and original Bylaws under which it is alleged that these alleged contracts

were made, the adoption of amended Section 7 governs the present situation and gives the General Manager full power and authority to employ and discharge.

It is apparent from the petition that the Trustee was no party to the alleged contracts. The Trustee, such as petitioner, goes into possession of the assets of the Debtor as an officer of the Court and freed of any obligation to perform those executory contracts which he elects to reject.

II.

Said Trustee by the dismissal of petitioners on December 28, 1951, elected to reject such alleged executory contracts.

The order appointing the Trustee herein granted him full power to manage and operate the business of said Debtor with all powers conferred upon a trustee both under Chapter X of the Bankruptcy Act, as well as with all of the powers of a receiver in equity.

Bankruptcy Act, Sec. 202; also Sec. 343;
Philadelphia Company v. Dipple,
312 U.S. 168, 61 S.Ct. 538.

At page 541, the court stated:

“Notwithstanding the fact that Sec. 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts, it is well settled that they have that right and are accorded a reasonable time within which to exercise it.”

11 U.S.C.A., Sections 511-616, and Suppl.,
p. 9.

III.

The present petition is an attempt on behalf of petitioners to specifically enforce personal service contracts which cannot be done either by direct decree of this Court or by injunction proceedings.

Civil Code, State of California, Sec. 3390, Subdvs. 1 and 2, providing as follows:

The following obligations cannot be specifically enforced:

1. An obligation to render personal service;
2. An obligation to employ another in personal service * * *.

Poultry Producers, etc., v. Barlow,
189 Cal. 278, Subdv. (8);

Bethlehem, etc., vs. Christie,
105 F. (2) 933,

holding:

“Even though the discharge of an agent is a breach of contract which gives him a right of action, the court will not restore him to position.”

Bach v. Friden, etc.,
155 F. (2d) 361, Subdv. 9.

A decree in a case of this kind would require constant supervision by this Court.

IV.

The rights of the parties to these alleged con-

tracts are to be governed by the laws of the State of California.

Urban Properties v. Benson,
116 F. (2d) 321, Subdv. (1) (Ninth Cir.).

Respectfully submitted,

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ STERLING CARR.

/s/ STERLING CARR,
Attorneys for Trustee.

[Endorsed]: Filed February 11, 1952.

[Title of District Court and Cause.]

**INTERLOCUTORY ORDER REINSTATING
EMPLOYEES WITH BACK PAY**

This matter having come on for hearing on February 11, 1952, before the above-entitled Court, Honorable George B. Harris presiding, on the verified petition of petitioners and the answer of debtor's trustee thereto and the motion of the trustee to dismiss said petition, Pembroke Goch-nauer, Esq., appearing as counsel for petitioners, Messrs. Rogers and Clark by Webster V. Clark, Esq., appearing as counsel for the debtor, and Sterling Carr, Esq., and Messrs. Orrick, Dahlquist, Neff & Herrington by George Herrington, Esq., and Walter G. Olson, Esq., appearing as counsel for the debtor's trustee, and evidence, oral and documentary, having been produced by the parties

on the 11th, 12th, 13th and 14th days of February, 1952, and the Court having heard and considered all the evidence and the arguments of counsel and having denied the trustee's motion to dismiss said petition, and being fully advised in the premises, and good cause appearing therefor:

It is hereby Ordered that the petitioners, J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott and John E. Vick, and each of them, be and they are hereby reinstated in the jobs held by them, respectively, on December 27, 1951, at the Cloverdale plant of the debtor, Coastal Plywood & Timber Company, or restored to substantially equivalent employment by said debtor at said plant at equivalent rates of pay, pending the further order of this Court.

It is further Ordered that the debtor's trustee shall forthwith reimburse each of said petitioners from the debtor's estate for all wages lost by them, respectively, on and after December 28, 1951, by reason of the layoff or discharge of said petitioners on or about said date, at the rates of pay then being received by them, respectively.

Dated February 15, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed February 15, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM INTERLOCU-
TORY ORDER REINSTATING EM-
PLOYEES WITH BACK PAY

To the Clerk of the Above-Entitled Court, and to
J. W. Norberg, Nils G. Matson, Merritt W.
Tallman, Milo F. Barnhart, Roland C. Zim-
mermann, Floyd C. Jackson, Gladys M. Zim-
mermann, Edwin H. Jasmann, Frank Sutton,
George F. Scott, and John E. Vick, and to
Pembroke Gochnauer, Esq., Their Attorney,
and to Messrs. Rogers and Clark, Appearing
as Counsel for Debtor:

You, and each of you, Will Please Take Notice
that Fred G. Stevenot, the duly and regularly
appointed, qualified and acting Trustee of the
property and assets of Debtor above named, hereby
appeals to the Court of Appeals of the Ninth Cir-
cuit from that certain "Interlocutory Order Rein-
stating Employees With Back Pay" entered in the
above-entitled proceedings on the 15th day of Feb-
ruary, 1952, the Honorable George B. Harris pre-
siding.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

/s/ STERLING CARR,

By /s/ STERLING CARR,

Attorneys for Trustee.

[Endorsed]: Filed February 25, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Now comes Fred G. Stevenot, Trustee of Debtor, above named, and Appellant, above named, and sets forth a statement of the points upon which appellant intends to rely on appeal, as follows:

1. The District Court erred in denying appellant's motions to dismiss the petition for reinstatement of employees with back pay.

2. The District Court erred in including in said order, last above referred to, the following provision:

“It is further Ordered that the debtor's trustee shall forthwith reimburse each of said petitioners from the debtor's estate for all wages lost by them, respectively, on and after December 28, 1951, by reason of the layoff or discharge of said petitioners on or about said date, at the rates of pay then being received by them, respectively.”

3. The District Court erred in granting the petition of petitioners for specific performance of their contracts for personal services.

4. The District Court erred in not holding that the original contract of employment contained on the back of the stock certificate issued to each of petitioners was amended and changed by the

Amended Bylaws adopted by Debtor on September 10, 1950.

5. The District Court erred in holding that Section 7 of Article III of said Bylaws, duly and regularly adopted by the said Stockholders of said Debtor on the 10th day of September, 1950, and reading as follows to wit:

“Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation,”

did not give to and empower said General Manager of said Debtor full and uncontrolled right, power and authority to employ and discharge agents and employees of said Debtor at any time and for any reason or purpose whatsoever and which to him seemed best.

6. The District Court erred in not holding that the failure of petitioners to offer their stock to Debtor as required by its Articles of Incorporation and/or Bylaws before granting to a third party an option to purchase the same constituted a breach of contract with Debtor which entitled Debtor and appellant herein to discharge petitioners and each

of them from their and each of their employment with Debtor.

7. The District Court erred in substituting its judgment for that of the Trustee (appellant herein) and his General Manager in the ordinary operations of Debtor.

Dated this 7th day of March, 1952.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

/s/ STERLING CARR,
Attorneys for Said Trustee.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 7, 1952.

[Title of District Court and Cause.]

MOTION TO REQUIRE TRUSTEE AND APPELLANT TO FILE TRANSCRIPT OF RECORD AND SUPERSEDEAS BOND

Petitioners and appellees, J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott and John E. Vick, move the Court as follows:

1. For an order requiring Trustee and Appellant pursuant to Rule 75 (b) of the Federal Rules of Civil Procedure to file a transcript of the entire

record, evidence and proceedings of the trial in this matter, as set forth in "Designation by Appellees of Additional Portions of the Record, Proceedings and Evidence to Be Included in the Record on Appeal" filed herein on or about March 17, 1952.

2. To file a supersedeas bond as required by Rule 73 (d) of the Federal Rules of Civil Procedure.

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners and
Appellees.

NOTICE OF MOTION

To Orrick, Dahlquist, Neff & Herrington, and Sterling Carr, Attorneys for Trustee and Appellant; Rogers and Clark, Attorneys for Debtor:

Please Take Notice that petitioners will bring the above motion on for hearing before this Court in the courtroom of said Court, Room 276, Post Office Building, Seventh and Mission Streets, San Francisco, California, on Friday, the 21st day of March, 1952, at 3:00 o'clock p.m. of that day or as soon thereafter as counsel can be heard.

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners and
Appellees.

Stipulation

It Is Hereby Stipulated by and between the parties hereto that the above motion may be heard as above noticed.

Dated San Francisco, California, this 20th day of March, 1952.

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners and
Appellees.

/s/ STERLING CARR,
ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ STERLING CARR,
Attorneys for Trustee and
Appellant.

ROGERS AND CLARK,
By /s/ WEBSTER V. CLARK,
Attorneys for Debtor.

So Ordered:

/s/ GEORGE B. HARRIS,
Judge United States District
Court.

Points and Authorities in Support of Motion

1. Filing of transcript.

Rule 75 (b), Federal Rules of Civil Procedure;

Sablette v. Servel, Inc. (1942, C.C.A. 8), 124 F. 2nd 516.

2. Supersedeas bond.

Rule 73 (d), Federal Rules of Civil Procedure;

Pacific Coast Casualty Co. v. Harvey (1918, C.C.A. 9), 250 F. 952.

Respectfully submitted,

/s/ PEMBROKE GOCHNAUER,

Attorney for Petitioners and
Appellees.

[Endorsed]: Filed March 20, 1952.

In the District Court of the United States for
the Northern District of California, Northern
Division

No. 12223

In Proceedings for the Reorganization
of a Corporation.

In the Matter of
COASTAL PLYWOOD & TIMBER COMPANY,
a Corporation,

Debtor.

ORDER REINSTATING EMPLOYEES
WITH BACK PAY

The verified petition of J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sut-

ton, George F. Scott and John E. Vick for reinstatement in their employment by the Debtor, Coastal Plywood & Timber Company, having come on regularly for hearing before the above-entitled Court, the Honorable George B. Harris presiding, on the 11th, 12th, 13th, 14th and 15th days of February, 1952, on said verified petition and the answer of the Debtor's trustee thereto and the motion of said trustee to dismiss said petition and upon all the other papers, records and files in the above-entitled proceeding and petitioners appearing by their counsel, Pembroke Gochnauer, Esq., the Debtor appearing by its counsel, Messrs. Rogers and Clark, by Webster V. Clark, Esq., and said trustee appearing by his counsel, Sterling Carr, Esq., and Messrs. Orrick, Dahlquist, Neff & Herrington, by George Herrington, Esq., and Walter G. Olson, Esq., and evidence oral and documentary, having been submitted to the Court in support of said petition and in opposition thereto, and the Court having heard and duly considered all the evidence and the arguments of counsel and having denied the trustee's motion to dismiss said petition and being fully advised in the premises, the Court now makes the following

Findings of Fact

1. The Debtor, Coastal Plywood & Timber Company, is, and continuously at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its office and principal place of business at Cloverdale, California.

2. Each of the petitioners is now and for two or more years last past has been, the holder of one share of the outstanding capital stock of said Debtor for which he or she paid the sum of \$2,500.00. Prior to December 28, 1951, each of said petitioners has been regularly and continuously employed by the Debtor company at its plant at Cloverdale, California, except during plant or departmental shut-downs, for periods of time ranging from two years and four months to five years and three months. Each of said petitioners, except the petitioners Scott and Tallmann, is a creditor of the Debtor company in amounts ranging from \$200.00 to \$1,650.00, representing moneys loaned by them to said company. The petitioner Norberg is the president and a director of the Debtor Company; the petitioner Barnhart is its vice-president and a director, and the petitioner Jackson is a director of the Debtor company.

3. At the time each of the petitioners purchased his or her share of stock in the Debtor corporation said stock constituted Class "A" stock of said company and its articles of incorporation contained the following provisions, to wit:

"Article IX

"In view of the particular nature of this corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with Class 'A' stock ownership, no share of Class 'A' stock may be issued except as follows:

“One share of such stock only can be issued to or owned by any stockholder, and such stockholder must be an active employee, or a person acceptable to the Board of Directors as a future active employee of the Corporation.”

It is further provided that:

“(a) No owner of Class ‘A’ stock may sell, transfer or assign his share until and unless he first gives to the Corporation’s President or Secretary written notice of his intention to sell, transfer or assign, setting forth in such notice the number of the certificate therefor and the name and residence of the person who is the holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors shall, for a period of 60 days after receipt of such written notice, have the sole and exclusive option of purchasing said share at the bona fide market value, as hereinafter defined. Payment for such share may be made by the Board of Directors by depositing said bona fide market value to the credit of such shareholder in any National Bank in Cloverdale, California, or San Francisco, California, to be paid to such shareholder by said bank upon the surrender of the certificate for said share of Class ‘A’ stock properly endorsed; the Board shall give written notice of such deposit to the shareholder (by registered mail addressed to the person and address given in the stockholder’s notice).

“(b) Any person acquiring through will, de-

scent, or by conveyance to take effect at death, or sale in the administration of any estate, any share of Class 'A' stock of the Corporation shall be bound to give written notice of such acquisition to the President or Secretary of the Corporation, setting forth in such notice the number of the certificate, the name of the registered holder, and the name and residence address of the person acquiring such share, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors, for a period of 60 days after receipt of such notice, shall have an exclusive option of purchasing such share at the bona fide market value, as hereinafter defined. The person so acquiring said share shall be notified of the exercise of said option and paid therefor in the manner prescribed in sub-paragraph (a).

“(c) The purchaser of any share of Class 'A' stock sold on execution or any other sale by operation of, or under authority of, law and the pledgee of any share of Class 'A' stock before bringing any suit, action, or proceeding or doing any act to foreclose his pledge shall first deliver to the President or Secretary of the Corporation written notice of such purchase or intention to foreclose, designating the number of the certificate and the name and residence address of the pledgee or the present holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors shall have the sole and exclusive option, for a period

of 60 days after receipt of such notice, to purchase said shares at the bona fide market value, as hereinafter defined. Notice of the exercise of said option and payment to be accomplished in the manner herein above prescribed in subparagraph (a).

“(d) On behalf of the Corporation the Board of Directors shall have the sole and exclusive option to purchase from any holder of Class ‘A’ stock who shall fail to report for work within sixty (60) days after the mailing to him, by registered mail, of written call to report for work, or who shall voluntarily or involuntarily cease to be employed by the Corporation by reason of discharge, retirement, resignation, disability or any other reason whatsoever, the share of stock of such holder at the bona fide market value, as hereinafter defined, for a period of 60 days from such failure to report or such cessation of employment. Notice of the exercise of said option and payment to be accomplished in the manner prescribed in subparagraph (a).

“The specific provisions governing discharge, retirement, or disability shall be set forth in the By-laws.

“(e) Shares of Class ‘A’ stock shall give to the holder thereof no power to vote thereon and no right to dividends declared thereon subsequent to notification by the Corporation of its exercise of option to purchase under the terms and conditions defined in subparagraphs (a), (b), (c) and (d) above. Upon a stockholder’s refusal to surrender his certificate, the Corporation, after making proper deposit of payment, may cancel such certificate.

“(f) Shares of Class ‘A’ stock acquired by the Corporation under the provisions of subparagraphs (a), (b), (c) and (d) above may be resold only to persons who are or agree to become employees of the Corporation who own no Class ‘A’ stock, limiting such resales to one share of Class ‘A’ stock per employee.

“(g) Bona fide market value is defined as follows:

“(1) The Board of Directors and the person desiring to sell or foreclose may agree upon the bona fide market value at which the Corporation shall repurchase the stock.

“(2) In the event said bona fide market value is not agreed upon it shall be determined by an appraisal made by a majority of three appraisers who shall be selected, one by any owner, holder or pledgee referred to in (a), (b), (c) and (d) above, one by the Board of Directors, and one by the two appraisers thus selected. If the two appraisers so selected shall not, within twenty days of their selection, agree upon the third appraiser, either party may apply, upon five days’ written notice to the other, to any judge of any court of general jurisdiction in Sonoma or Mendocino counties, California, for the appointment of such third appraiser. The three appraisers so selected shall, within 20 days after the third appraiser is selected, appraise such shares and give written notice thereof to both parties, any expenses of appraisal to be paid one-half by each party. The Corporation’s 60-day option to purchase,

as set forth in (a), (b), (c) and (d) above, shall be extended by the time required for selection of appraisers and appraisalment.

“(3) Bona fide market value shall be determined as of the date the Corporation receives the written notice referred to in subparagraphs (a), (b) and (c) above, or sends the written notice provided for in subparagraph (d) above.

“(h) If the Corporation fails to exercise or waives its option to purchase said stock as provided for in this Article IX, said stock may be sold or transferred at any price agreed upon between the holder and the transferee, provided only, that such transferee is an active employee holding no Class ‘A’ stock or is a person acceptable to the Board of Directors as a future active employee of the Corporation.”

At all times herein mentioned the articles of incorporation of the Debtor corporation have continued to include the foregoing provisions and do now include all of said provisions with the exception that the designation of the shares subject thereto as Class “A” stock has been eliminated by amendment and all the outstanding capital stock of said Debtor including that held by petitioners is now subject to said provisions.

At the time each of said petitioners purchased his or her share of Class “A” stock in the Debtor corporation its bylaws contained the following provisions, to wit:

“Article IV**“Wages**

“Section 1. An employed stockholder holding Class ‘A’ common stock shall be entitled before the payment of dividends on Class ‘A’ common stock and Class ‘B’ common stock to withdraw and be paid his wages, not in excess of the following sums:

“(a) Every employed Class ‘A’ stockholder, regardless of whether he begins his employment before or after the sawmill shall have attained production, shall work for a ‘beginning period’ at the rate of One and 51/100 Dollars (\$1.51) per hour. The length of the ‘beginning period’ shall be at least nine (9) months, or the number of months from September 15, 1946, until the sawmill shall have attained production, if that be more than nine (9) months.

“(b) After the expiration of the ‘beginning period,’ an employed Class ‘A’ stockholder may be paid not in excess of Two and 23/100 Dollars (\$2.23) per hour, such increases over the average going wage of the industry being considered an incentive wage predicated on the recognition that the gross average output per man of employees of Class ‘A’ stockholders’ group will exceed the average per man output of the industry; provided, however, that if the average straight time hourly rate of pay in these respective noncooperative industries in Washington and Oregon falls below or rises above the average straight time hourly rate of One and 51/100 Dollars (\$1.51) per hour now prevailing, the hourly rate

then payable, both during the beginning period and thereafter, shall be reduced or increased in the same amount, penny for penny, it being understood that no adjustment in said hourly rate shall be made except in the event of a full 2½¢ per hour change upward or downward, in the average straight time hourly rate.

“Section 2. Vacations:

“(a) Each employee, after one year of continuous employment, shall be entitled each year to one (1) week’s vacation with pay (based on the 40-hour week at the employee’s straight time hourly rate in effect on the pay day immediately preceding the date fixed as the start of the vacation), or, at the discretion of the Board of Directors, a possible two (2) weeks’ vacation with pay. The Board of Directors may grant longer vacations than two (2) weeks, upon such terms and conditions as may seem advisable to it upon concurrence of a majority of the directors elected by the Class ‘B’ stock voting separately.

“(b) To be eligible for a vacation with pay the employee must have been in the continuous employment of the Company for one year prior to June 1st of the year during which the vacation takes place and must be on the payroll at the time his vacation commences.

“(c) ‘Continuous employment’ for purposes of vacation is defined as employment uninterrupted by:

“(1) Absence due to discharge.

“(2) Leave of absence granted by the Company in excess of thirteen (13) weeks.

“(3) Involuntary layoffs totaling in excess of thirteen (13) weeks due to shutdowns for causes over which the Company has no control. Working on any one day of the calendar week shall be counted as ‘continuous employment’ during that week.

“However, time lost as a result of an accident, as recognized by California workmen’s compensation laws, rules, and regulations, suffered during the course of employment, and the vacation period shall be considered as time worked.

“(d) Time for taking vacations shall be determined by the General Manager, whose determination shall be final.

“(e) Any other details concerning vacations shall be determined by resolution of the Board of Directors.

“Article V.

“Employee Relations

“Section 1. Suspension:

“The general manager may for cause suspend any employee without pay, for a period of not more than fifteen (15) days, and with the approval of a majority of the Board of Directors elected by the Class ‘A’ stockholders, may for cause suspend any employee without pay for a period of not more than thirty (30) days. The employee suspended may appeal his suspension to the Board of Directors within forty-eight (48) hours, if he feels that he has been suspended without sufficient cause. If his appeal is sustained, he will be reinstated and reimbursed for time lost.

“Section 2. Discharge:

“A Class ‘A’ stockholder employee may not be discharged except with the approval of the majority of the members of the Board of Directors who are elected by the Class ‘A’ stockholders. If the Class ‘A’ stockholder so discharged is unwilling to accept the decision of said Directors, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that his discharge be reviewed at a meeting of the Class ‘A’ stockholders called for the purpose in accordance with the provisions of the Bylaws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective.

“Section 3. Disability:

“Disability resulting in termination of employment is defined as that condition existing when an employee-Class ‘A’ stockholder has become physically or mentally disabled to the extent that he is permanently unable to work and when such disability has been determined by a majority of a board of three (3) doctors chosen one by the employee, one by the General Manager and one by the two thus chosen. The decision of this board shall be submitted in writing to the General Manager, and shall be final.

“Section 4. Retirement:

“Within one (1) year after both the plywood plant and the sawmill are in production, the Board of Directors shall adopt a retirement plan satisfac-

tory to the Class 'A' stockholders for all or part of the employees, upon such terms and conditions as seem advisable, provided such plan is approved by a separate vote of a majority of the Directors elected by the Class 'B' stockholders.

“Section 5. Duty in Armed Services:

“Any employee-stockholder answering the call to duty in the Army, Navy or any of their direct branches during any period of national emergency, either for training or for service, shall be granted leave of absence and retain all rights and privileges as an employee-stockholder including dividend and voting rights but shall not be entitled to wages during such absence. Said employee-stockholder shall report as soon as possible to the Company upon completion of his service.”

Said provisions remained part of the bylaws of the Debtor company continuously until on or about September 10, 1950, when they were eliminated by amendment as hereinafter set forth.

4. The aforesaid provisions of the articles of incorporation and bylaws of the Debtor corporation, Coastal Plywood and Timber Company, were, and each of them was, in full force and effect at the time each of the petitioners herein purchased his or her share of stock in said company and said provisions were intended to afford job security and job tenure to each of the petitioners as an employee of said company and to constitute a valid and enforceable agreement between said company and each of the petitioners. In reliance upon said provisions and

agreement each petitioner paid the sum of \$2,500.00 to the Debtor corporation for his or her share of stock and accepted employment by the Debtor at its plant at Cloverdale, California, and has since continued to work as an employee of said company until on or about December 28, 1951, when the employment of each of the petitioners was terminated by the Debtor's trustee under the circumstances hereinafter found. Prior to purchasing said stock and accepting said employment each of the petitioners resided elsewhere than Cloverdale, California; and in reliance upon said provisions and said agreement and upon accepting said employment, each of the petitioners was induced to and did move his or her residence to Cloverdale where all of them now reside and each petitioner, except the petitioners Tallman and Gladys M. Zimmermann, has purchased or is now purchasing a home in Cloverdale in reliance upon his continued employment by the Debtor company pursuant to said provisions and agreement, as aforesaid.

5. Subsequently on or about September 10, 1950, the bylaws of the Debtor company were amended by vote of a majority of its shareholders, as authorized therein, to, among other things, eliminate the aforesaid provisions relating to job security and job tenure which had theretofore constituted part of said bylaws and to include the following further provision, to wit:

“Section 7. General Manager: The General Manager shall have general supervision and

direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation."

At the time the above-mentioned amendments to the bylaws were adopted on or about September 10, 1950, as aforesaid, the Debtor corporation was indebted to the Bank of America, National Trust and Savings Association, and the Reconstruction Finance Corporation in the approximate amount of \$2,600,000, secured by mortgages on substantially all its property and assets; and said amendments were unequivocally demanded and required by said bank and the Reconstruction Finance Corporation as the absolute condition to the continuance of said loans and all future financing and were adopted solely for the purpose of complying with the demands and requirements of the lending institutions and were not intended to in any manner impair or abrogate the job security and job tenure provisions of the original agreements between the Debtor company and petitioners. Said agreements constituted by the Debtor's articles of incorporation and bylaws as they existed at the time petitioners purchased their said stock were not impaired or abrogated in any respect by said amendments.

6. On or about November 1, 1951, by order of

the above-entitled Court duly made and entered on that day, Fred G. Stevenot was appointed trustee of the estate of said Debtor, Coastal Plywood and Timber Company, in the above-entitled proceeding and was authorized and directed, among other things, to conduct and operate the business of said Debtor and to employ and discharge, and to fix, subject to the approval of the Court, the rate of compensation of all officers, managers, superintendents, agents and employees. Thereafter, on or about November 6, 1951, the said Stevenot duly qualified as such trustee and ever since has been, and now is, the duly appointed, qualified and acting trustee of the estate of said Debtor in said proceedings. Thereupon, pursuant to said authority and the further order of the Court duly made and entered herein on December 5, 1951, the said Stevenot as such trustee employed one Martin Dyke as manager of the business operations of the Debtor for the purpose, among other things, of managing the continued operation of the Debtor's plant and lumbering operations at Cloverdale, where all the petitioners were then employed as aforesaid. Prior to such employment by the trustee, the said Dyke had held the position of general manager of the Debtor company since October, 1949, during all of which time the petitioners were continuously employed by said company.

7. On or about December 20, 1951, the said Stevenot as such trustee rendered and filed his sworn report to the Court in said proceedings representing, among other things, that he had retained in

the employ of the Debtor company such employees in addition to the said Dyke as he, the said Stevenot, deemed necessary to continue the profitable operation of the business of said company. At said time all the petitioners were regularly employed by said company.

8. On or about December 28, 1951, without any prior notice or warning whatsoever to petitioners, or any of them, the said Dyke as manager of the Debtor's business employed by the Court's trustee as aforesaid, laid off each of the petitioners effective as of the close of the work day December 28, 1951; and thereafter, to wit, on or about February 1, 1952, upon the service on counsel for the trustee of the petition for reinstatement filed herein by said petitioners, the said Dyke finally determined that petitioners, and each of them, were permanently discharged from all further employment by said company solely by reason of their having instituted said petition for redress by the Court. Petitioners, and each of them, remained unemployed by the Debtor company until they were reinstated by the hereinafter mentioned interlocutory order of this Court made and entered herein on February 15, 1952. Meanwhile normal operations continued at the Debtor's Cloverdale plant from and after December 28, 1951, and the said Dyke immediately replaced each of the petitioners with another employee.

9. Prior to being laid off on December 28, 1951, as aforesaid, none of the petitioners had ever been warned or told by the said Dyke or by any other

representative of the management of the Debtor company that his or her work performance was unsatisfactory or undesirable, but on the contrary certain of the petitioners had been informed from time to time by their immediate supervisors that their work was entirely satisfactory. No reason was given to any of the petitioners for said layoff or discharge and no benefit whatever resulted to the Debtor's business or estate therefrom. Although the discharge of petitioners by the said Dyke was approved and authorized by the said Stevenot as the Court's trustee, nevertheless no application was made to the Court for specific authority to layoff or discharge petitioners, or any of them, and they were so laid off and discharged without specific authorization by the Court. None of the petitioners was guilty of any misconduct nor any failure to properly perform his or her job duties in any respect whatsoever and the aforesaid layoff and discharge of petitioners by the said Dyke was as to each of them wholly without cause or sufficient reason or justification in the proper conduct and management of the Debtor's business and estate. Said layoff and discharge was arbitrary and capricious as to each and all of said petitioners and was in violation of their rights and contrary to sound industrial relations practice and was due solely to the fact that the said Dyke personally opposed petitioners in the exercise of their statutory corporate rights as shareholders and/or officers and/or directors of the Debtor corporation in matters totally unrelated to the proper

administration and preservation of the Debtor's business and estate by the Court's trustee and having no effect whatsoever thereon; and the reinstatement of petitioners in their respective employments or in substantially equivalent employment will have no adverse or harmful effect whatever upon the proper administration and preservation of the Debtor's business and estate by the Court's trustee but on the contrary such reinstatement with restitution of the earnings lost by petitioners by reason of said wrongful layoff and discharge will be for the best interests of the Debtor company.

10. All of the petitioners were reinstated as employees of the Debtor company, or offered reinstatement as employees of the Debtor company, on February 18, 1952. No part of the wages lost by petitioners, or any of them, by reason of said layoff or discharge has been paid to them. Petitioners made diligent efforts to obtain other employment during the period of said layoff or discharge, which resulted in the employment of six of said petitioners in other work during a part of said period. Each of the petitioners received unemployment compensation under the laws of the State of California during the period that each of them was unable to obtain employment. By stipulation made in open Court between counsel for the respective parties, the amounts of wages lost by petitioners, respectively, on and after December 28, 1951, by reason of said layoff or discharge are:

| Petitioner— | Amount |
|----------------------------|------------|
| J. W. Norberg | \$370.54 |
| Nils G. Matson | 350.74 |
| Merritt W. Tallman | 486.92 |
| Milo F. Barnhart | 385.15 |
| Roland C. Zimmermann | 501.45 |
| Floyd C. Jackson | 422.60 |
| Gladys M. Zimmermann | 419.22 |
| Edwin H. Jasmann | 495.16 |
| Frank Sutton | 473.88 |
| George F. Scott | 508.60 |
| John E. Vick | 473.36 |
| | <hr/> |
| Total | \$4,887.62 |

And as its

Conclusions of Law

from the foregoing findings of fact, the Court concludes that:

1. Petitioners, and each of them, are entitled to reinstatement in the jobs held by them, respectively, on December 27, 1951, at the Cloverdale plant of said Debtor, Coastal Plywood and Timber Company, or restored to substantially equivalent employment by said trustee for said Debtor at said plant at equivalent rates of pay; and

2. Petitioners, and each of them, are entitled to reimbursement from the Debtor's estate for wages lost by them, respectively, on or after December 28,

1951, in the amounts as aforesaid, by reason of the layoff or discharge of said petitioners on or about said date.

The Court having heretofore on February 15, 1952, made and entered its interlocutory order to the foregoing effect,

Now Therefore, in accordance with said interlocutory order and the foregoing findings of fact and conclusions of law, it is hereby Ordered, Adjudged and Decreed that

1. The Petitioners, J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott and John E. Vick, and each of them, be, and they are hereby reinstated in the jobs held by them, respectively, on December 27, 1951, at the Cloverdale plant of the Debtor, Coastal Plywood and Timber Company, or restored to substantially equivalent employment at said plant at equivalent rates of pay; and

It is further Ordered, Adjudged and Decreed that the Debtor's trustee shall forthwith reimburse each of said petitioners from the Debtor's estate for wages lost by them, respectively, on and after December 28, 1951, by reason of the layoff or discharge of said petitioners on or about said date, in the following amounts, with interest at the rate of seven per cent (7%) per annum since February 18, 1952:

| Petitioner— | Amount |
|----------------------------|------------|
| J. W. Norberg | \$370.54 |
| Nils G. Matson | 350.74 |
| Merritt W. Tallman | 486.92 |
| Milo F. Barnhart | 385.15 |
| Roland C. Zimmermann | 501.45 |
| Floyd C. Jackson | 422.60 |
| Gladys M. Zimmermann | 419.22 |
| Edwin H. Jasmann | 495.16 |
| Frank Sutton | 473.88 |
| George F. Scott | 508.60 |
| John E. Vick | 473.36 |
| <hr/> | |
| Total | \$4,887.62 |

Dated: May 12, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Not approved as to form, as provided in Rule 5(d), on the ground that the so-called Findings of Fact include erroneous conclusions of law.

**ORRICK, DAHLQUIST, NEFF
& HERRINGTON,**

/s/ STERLING CARR,
Attorneys for Trustee.

Approved as to form, as provided in Rule 5(d).

ROGERS AND CLARK,
Attorneys for Debtor.

Lodged March 17, 1952.

[Endorsed]: Filed May 13, 1952.

[Title of District Court and Cause.]

ORDER REQUIRING TRUSTEE AND APPELLANT TO FILE SUPERSEDEAS BOND

This matter having come on regularly for hearing on the 21st day of March, 1952, and further hearing having been had on the 1st day of May, 1952, before the above-entitled court, Honorable George B. Harris presiding, on motion of Petitioners J. W. Norberg, et al., for an order requiring the Trustee and Appellant to file a supersedeas bond as required by Rule 73(d) of the Federal Rules of Civil Procedure, Pembroke Gochnauer, Esquire, appearing as attorney for Petitioners, Messrs. Rogers and Clark, by Webster V. Clark, Esquire, appearing as counsel for Debtor, and Sterling Carr, Esquire, and Messrs. Orrick, Dahlquist, Neff & Herrington, by George Herrington, Esquire and W. W. Olson, Esquire, appearing as counsel for the debtors' Trustee;

And it appearing that the words "all wages lost" as they appear in The Interlocutory Order Reinstating Employees with back pay, made and entered herein on or about February 15, 1952, and in any final order hereafter made and entered herein, are, and shall be construed to be, the amounts so indicated below:

| Petitioner— | Amount |
|----------------------------|------------|
| J. W. Norberg | \$370.54 |
| Nils G. Matson | 350.74 |
| Merritt W. Tallman | 486.92 |
| Milo F. Barnhart | 385.15 |
| Roland C. Zimmermann | 501.45 |
| Floyd C. Jackson | 422.60 |
| Gladys M. Zimmermann | 419.22 |
| Edwin H. Jasmann | 495.16 |
| Frank Sutton | 473.88 |
| George F. Scott | 508.60 |
| John E. Vick | 473.36 |
| <hr/> | |
| Total | \$4,887.62 |

And it appearing that Debtor's Trustee has not reimbursed all or any of the said Petitioners for all or any wages lost in compliance with said Order, and that said Order has not been stayed and is in full force and effect, and that said Trustee has filed notice of appeal to the United States Court of Appeals for the Ninth Circuit from said Order and his counsel has expressed an intention of so appealing from any final judgment hereinafter entered herein, and good cause appearing therefor,

It Is Hereby Ordered, pursuant to Rule 75(d) of the Federal Rules of Civil Procedure that Debtor's Trustee is hereby required to cause to be prepared and filed with this court a supersedeas bond in the sum of Ten Thousand (\$10,000.00) Dollars, with surety or sureties satisfactory to this court, conditioned for the reimbursement from the Debtor's estate for all wages lost by the Petitioners and each

of them, in satisfaction of the judgment herein in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the United States Circuit Court of Appeals for the Ninth Circuit may adjudge and award.

Dated: May 12, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 13, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER RE-
QUIRING TRUSTEE AND APPELLANT
TO FILE SUPERSEDEAS BOND

To the Clerk of the Above-Entitled Court, and to J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmerman, Floyd C. Jackson, Gladys M. Zimmerman, Edwin H. Jasmann, Frank Sutton, George F. Scott, and John E. Vick, and to Pembroke Gochnauer, Esq., Their Attorney, and to Messrs. Rogers and Clark, Appearing as Counsel for Debtor:

You, and each of you, Will Please Take Notice That Fred G. Stevenot, the duly and regularly ap-

pointed, qualified and acting Trustee of the property and assets of Debtor above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from that certain "Order Requiring Trustee and Appellant to File Supersedeas Bond," entered in the above-entitled proceedings on the 16th day of May, 1952, the Honorable George B. Harris presiding.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ GEORGE HERRINGTON,

/s/ STERING CARR,

Attorneys for Trustee.

[Endorsed]: Filed May 21, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER REIN-
STATING EMPLOYEES WITH BACK PAY

To the Clerk of the Above-Entitled Court, and to J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmerman, Floyd C. Jackson, Gladys M. Zimmermann, Erwin H. Jasman, Frank Sutton, George F. Scott, and John E. Vick, and to Pembroke Gochnauer, Esq., Their Attorney, and to Messrs. Rogers and Clark, Appearing as Counsel for Debtor:

You, and each of you, Will Please Take Notice That Gred G. Stevenot, the duly and regularly ap-

pointed, qualified and acting Trustee of the property and assets of Debtor above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from that certain "Order Reinstating Employees With Back Pay," entered in the above-entitled proceedings on the 16th day of May, 1952, the Honorable George B. Harris presiding.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ GEORGE HERRINGTON,

/s/ STERLING CARR,

Attorneys for Trustee.

[Endorsed]: Filed May 21, 1952.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements on Account of Petition for
Reinstatement of Employees With Back Pay

| | |
|--|---------|
| Transcript of Remarks of the Court at Conclusion of Argument, Friday, Feb. 15, 1952. | 4.00* |
| Witness fees and Mileage—See Schedule I. | 199.20* |
| Cost of verification of Petition for Reinstatement of Employees with Back Pay. | .50 |
| Fee for service of subpoena on Martin T. Dyke, February 1, 1952. | 2.50 |

*Disallowed

Memorandum of Costs and Disbursements—(Cont.)

| | |
|--|----------|
| Cost of Affidavit of Service of subpoena | |
| on Martin T. Dyke..... | .50 |
| Cost of verification herein..... | .50 |
| | _____ |
| Total Disbursements | \$207.20 |
| 6-6-52. Taxed and allowed at..... | 4.00 |

/s/ C. C. EVENSEN,
Deputy Clerk.

State of California,
City and County of San Francisco—ss.

Pembroke Gochnauer being duly sworn, deposes and says: That he is the attorney for petitioners in the Petition for Reinstatement of Employees with Back Pay in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

/s/ PEMBROKE GOCHNAUER.

Subscribed and sworn to before me this 21st day of May, A.D. 1952.

[Seal] /s/ LORAINÉ MICHEL,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires: April 18, 1953.

To Messrs. Orrick, Dahlquist, Neff & Herrington
and Sterling Carr, Esq., attorneys for Trustee:

You will please take notice that on Friday the 23rd day of May, A.D. 1952, at the hour of 2:00 o'clock p.m., Petitioners in Petition for Reinstatement of Employees with Back Pay will apply to the clerk of said Court, to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said Court, in such case made and provided.

/s/ **PEMBROKE GOCHNAUER,**
Attorney for Petitioners.

Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this 21st day of May, A.D. 1952.

**ORRICK, DAHLQUIST, NEFF
& HERRINGTON,**

/s/ **STERLING CARR,**
Attorneys for Trustee.

Schedule I.

| Date | Witness | Per Diem Fee | Mileage from Clo- verdale, California, to San Francisco and return (180 miles at 7c per mi.) |
|--------------|--|--------------------|--|
| Feb. 2, 1952 | Wesley Cross | \$ 4.00 | \$ 12.60 |
| May 1, 1952 | J. W. Norberg..... | 4.00 | 12.60 |
| do | Nils G. Matson..... | 4.00 | 12.60 |
| do | Merritt W. Tallman..... | 4.00 | 12.60 |
| do | Milo F. Barnhart..... | 4.00 | 12.60 |
| do | Roland C. Zimmerman.... | 4.00 | 12.60 |
| do | Floyd C. Jackson..... | 4.00 | 12.60 |
| do | Gladys M. Zimmerman.. | 4.00 | 12.60 |
| do | Edwin H. Jasmann..... | 4.00 | 12.60 |
| do | Frank Sutton | 4.00 | 12.60 |
| do | George F. Scott..... | 4.00 | 12.60 |
| do | John E. Vick..... | 4.00 | 12.60 |
| | | <hr/> | |
| | | \$48.00 | \$151.20 |
| | | | 48.00 |
| | | | <hr/> |
| | Total of Witness Fees and Mileage..... | | <u>\$199.20</u> |

[Endorsed]: Filed May 22, 1952.

[Title of District Court and Cause.]

STIPULATION CONTINUING HEARING
ON TAXING OF COSTS

It Is Hereby Stipulated that the hearing on the taxing of costs as set forth in the cost bill of petitioners and verified upon May 21, 1952, may be continued by the Clerk of the above-entitled Court from the 23rd day of May, 1952, to the 2nd day of June, 1952, at the hour of two o'clock p.m.

It Is Further Stipulated that either side instead of appearing in person at said hearing may set forth

his objections or contentions in writing and forward to the Clerk of the above-entitled Court after serving same upon the other parties.

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ STERLING CARR,

/s/ STERLING CARR,
Attorneys for Trustee.

Sterling Carr
One Montgomery Street
San Francisco 4

May 22, 1952.

Clerk of the United States District Court,
Post Office Building,
Ninth and "I" Streets,
Sacramento, California.
Attention: Mr. C. C. Evensen

Re: Coastal Plywood & Timber Co., Debtor.

Dear Mr. Evensen:

Thank you for your favor of May 21 enclosing a copy of your certificate on the appeal in the above-entitled matter. So far as I can see it covers everything and is excellently made up.

Late yesterday a cost bill was served on me in this matter, in which the time for taxing the costs was fixed for tomorrow (Friday) afternoon at two p.m.

It would be impossible for me to be there and I agreed with the other side on an extension to June 2, coming, at two o'clock p.m., and with the right to present our objections in writing rather than by personal appearance. Enclosed you will please find such Stipulation which I shall be obliged if you will file. If this time is not agreeable to you please be good enough to advise me and we will fix some other period.

Thanking you and with kind regards, believe me,

Sincerely,

/s/ STERLING CARR.

SC/we

Enclosure

[Endorsed]: Filed May 23, 1952.

[Title of District Court and Cause.]

**AFFIDAVIT IN SUPPORT OF MEMORAN-
DUM OF COSTS AND DISBURSEMENTS**

State of California,

City and County of San Francisco—ss.

Pembroke Gochnauer, being first duly sworn, deposes and says:

Affiant is the attorney for petitioners in the Petition for Reinstatement of Employees with Back Pay in the above-entitled proceedings. Said petition came on for hearing before the above-entitled Court,

Honorable George B. Harris presiding, on the 11th, 12th, 13th, 14th and 15th days of February, 1952, and an "Interlocutory Order Reinstating Employees with Back Pay," directed to the Debtor's trustee, was entered in the above-entitled proceedings on February 15, 1952. Since entry of said Order, the Debtor's trustee has failed to reimburse petitioners for any of the wages lost by them, as set forth in and as directed by said Order. Although the amounts of said wages lost were ascertainable from Debtor's records, without the necessity of further appearance of petitioners as witnesses before said Court, the Debtor's trustee refused to stipulate with petitioners as to the amounts of said wages, and consequently your affiant was compelled to require each of the petitioners to appear before said Court on May 1, 1952, for a hearing to enable the Court to determine the amounts of said wages. At the commencement of said hearing, George Herrington, Esq., one of the attorneys for the Debtor's trustee, announced in open Court that the Debtor's trustee was then ready to stipulate to the amounts of said wages lost by each of the petitioners, and said amounts were thereupon agreed to and fixed by stipulation between counsel for the respective parties. Thereafter, at said hearings, said Herrington called each of the petitioners to the stand as witnesses for the Trustee and examined each of them with respect to his efforts to obtain other employment during the period to which said amounts of lost wages relates. None of the petitioners testified at said hearing in his own behalf, but each of them was called by the adverse

party to testify as to his efforts to mitigate or lessen the amount of his own loss.

/s/ PEMBROKE GOCHNAUER.

Subscribed and sworn to before me this 29th day of May, 1952.

[Seal] /s/ LORAINÉ MICHEL,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires: April 18, 1953.

[Endorsed]: Filed May 31, 1952.

Pembroke Gochnauer
Attorney at Law
One Eleven Sutter Street
San Francisco 4
EXbrook 2-1869

May 29, 1952.

Mr. C. C. Evensen, Clerk,
District Court of the United States,
Northern District of California,
Post Office Box 1047,
Sacramento, California.

**Re: Coastal Plywood & Timber Company—
No. 12223. Memorandum of costs and
disbursements**

Dear Mr. Evensen:

A memorandum of disbursements in the above matter was filed on May 22, 1952. Thereafter a

stipulation between myself as counsel for the petitioners and the attorneys for the trustee was signed and presumably filed with you by the attorneys for the trustee. By the terms of this stipulation you are to tax costs in this matter on June 2, 1952, at 2:00 o'clock p.m. and either party may set forth his objections or contentions in writing and forward the same to you after serving same upon the other parties without appearing in person.

While I have not at this writing been served with any written objections or contentions of the trustee with respect to the memorandum of costs, it is my understanding that counsel for the trustee intends to object to the allowance as costs of the items of witness fees and mileage, each dated May 1, 1952, as listed in Schedule I attached to the said memorandum. I believe the basis of objection is that each of said items represents a claim of an individual who was a petitioner in the proceeding.

I do not understand that any objection is raised as to the allowance of witness fee and mileage to Wesley Cross, dated February 2, 1952. This witness was subpoenaed and paid the amounts claimed and he was not a party to the proceeding.

With respect to the witness fees and mileage costs claimed on behalf of each of the petitioners I enclose herewith my own affidavit setting forth in brief the circumstances surrounding their appearance in court. You will note no claim is presented for witness fees or mileage on behalf of petitioners

for their appearances during the trial—February 11-15, 1952, both inclusive.

On the basis of the affidavit enclosed herewith, it is submitted that these witness fees and mileage costs for May 1, 1952, appearing in said Schedule I, are properly allowable costs within the rule stated in the case of *Tuck vs. Olds*, 29 Fed. 883 (Circuit Court, W. D. Mich., S. D. 1886). See also *Roundtree vs. Rembert*, 71 Fed. 225 (Circuit Court, D.S.C. 1896); 8 *Cyclopedia of Federal Procedure*, Sec. 3650 at p. 456. It is my understanding, by these authorities, that these petitioners are entitled to witness fees and mileage costs as claimed, because their court attendance as witnesses has been shown by the enclosed affidavit to have been solely as witnesses of counsel for the Debtor's trustee, and not as witnesses in their own behalf.

Although these petitioners were not subpoenaed to appear as witnesses, still it is further submitted that they may appear voluntarily as witnesses and have their witness fees and mileage costs taxed as costs. *The Petroleum No. 5*, 41 F. 2d 268, (D.C.S.D. Texas 1930).

Respectfully yours,

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners.

G:C

Enclosure (1)

Receipt of a copy of this letter and of the affidavit of Pembroke Gochnauer referred to therein is hereby acknowledged this 29th day of May, 1952.

/s/ STERLING CARR,

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ STERLING CARR,

Attorneys for Trustee and
Appellant.

ROGERS AND CLARK,

By /s/ SCOTT GOODFELLOW,

Attorneys for Debtor.

[Endorsed]: Filed May 31, 1952.

Sterling Carr
One Montgomery Street
San Francisco 4

May 29, 1952.

Clerk of the United States District Court,
Post Office Building,
Ninth and "I" Streets,
Sacramento, California.
Attention: Mr. C. C. Evensen

Re: Coastal Plywood & Timber Company,
Debtor, No. 12223
In re: Retaxing Cost Bill

Dear Mr. Evensen:

Pursuant to the stipulation continuing the re-taxing of such cost bill and which stipulation has previously been sent you:

The Trustee hereby objects to the following items of said cost bill:

- (a) Transcript of Remarks of the Court:
- (b) Witness Fees and Mileage as per Schedule.

As to the Transcript: Such was ordered by counsel for petitioners for his own use and does not form a proper charge herein.

As to the Witness Fees and Mileage: All parties for whom such fees and charges were made were the petitioners to this proceeding—nominally the plaintiffs—and parties to the proceeding. They were not subpoenaed by the Trustee and therefore are not entitled to fees or mileage.

To this end, see the following cases:

Picking vs. Pennsylvania R. R., Etc.,
11 F. R. D. 71;

Re: Wahkeena—51 Fed. (2) 106;

The Philadelphia—163 Fed. 438;

Hopkins vs. General Electric—93 Fed.
Sup. 425, Subdvs. 4 and 5;

The Petroleum, Etc., 41 Fed. (2) 268.

For the reasons above stated and by virtue of such authorities, said Trustee hereby moves that such cost bill be retaxed and said items objected to herein be eliminated therefrom.

A copy of this letter is this day being mailed to Mr. Gochnauer, the attorney for the petitioners.

Very respectfully,

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,
STERLING CARR,

By /s/ STERLING CARR,
Attorneys for Trustee.

cc: Pembroke Gochnauer, Esq.
Attorney at Law
111 Sutter Street
San Francisco, California

P.S.—Since writing the above, Mr. Gochnauer has served upon us a copy of an affidavit and some authorities in support of his position. We respectfully request a few days to answer the same and further request that the same courtesy be extended to the attorney for petitioners.

/s/ STERLING CARR.

[Endorsed]: Filed May 31, 1952.

[Title of District Court and Cause.]

DESIGNATION OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL FROM ORDER REQUIRING
TRUSTEE TO FILE SUPERSEDEAS
BOND

Now comes Fred G. Stevenot, Trustee of Debtor above named, and Appellant above named, and sets forth a statement of the points upon which appellant intends to rely on appeal, as follows:

1. The District Court erred in making the Order requiring Trustee and Appellant to file a supersedeas bond and filed in the above-entitled Court on or about the 16th day of May, 1952.

2. The District Court erred in requiring said Trustee and Appellant to cause to be prepared and filed with said Court a supersedeas bond in the sum of Ten Thousand Dollars conditioned as set forth in said Order.

3. The District Court was without right, power or jurisdiction to make said Order filed herein as aforesaid on or about May 16, 1952, or to require said Trustee as a Trustee in Bankruptcy and an appellant herein to make or file said supersedeas bond.

4. The District Court erred in making its said Order requiring said Trustee and Appellant to make said payments to said petitioners in the amounts set forth in said Order.

5. The District Court erred in providing in said Order that said requirement for the payment of said sums to said petitioners as set forth in said Order should be made part of or become part of the Interlocutory Order reinstating employees with back pay upon the ground, among others, that an appeal had been taken from said Interlocutory Order reinstating employees with back pay prior to the making of said Order filed herein on or about May 16, 1952, and that by reason thereof said Court was without jurisdiction, right or authority to make said Order filed on or about May 16, 1952, a part of said Interlocutory Order reinstating employees with back pay.

Dated: June 2nd, 1952.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ STERLING CARR,

/s/ STERLING CARR,

Attorneys for Trustee and
Appellant.

[Endorsed]: Filed June 3, 1952.

Sterling Carr
One Montgomery Street
San Francisco 4

June 3, 1952.

Clerk of the United States District Court,
Post Office Building,
Ninth and "I" Streets,
Sacramento, California.
Attention: Mr. C. C. Evensen.

In the Matter of Coastal Plywood & Timber
Co., Debtor, In re Retaxing Cost Bill

Dear Mr. Evensen:

Replying to Mr. Gochnauer's affidavit and letter to you of May 29th, last, in the above matter:

The witnesses in question were all petitioners and direct parties to the action and as such claiming witness fees and costs of transportation in their own proceeding. They were brought to court by Mr. Gochnauer, their own attorney, and were not subpoenaed by defendants, and the testimony elicited from them by Mr. Herrington was on cross-examination to ascertain whether or not they had or could have secured employment during the period in question for which they were seeking damages from the Trustee. They voluntarily appeared in Court after the Trustee through his attorneys had agreed to take their deposition in Cloverdale. Such offer was rejected by Mr. Gochnauer who stated that he preferred to have them present in Court. The fact that no witness fees are claimed for these particular parties for their appearance during the trial in

February of this year is immaterial on this present proceeding for counsel evidently recognized that such a charge would have been improper.

The parties in question were not called to the stand by Mr. Herrington as witnesses for the Trustee, but were called under cross-examination as aforesaid to establish whether or not such damages were or might have been minimized. All of the witnesses did testify in their own behalf to establish the fact that no minimization was present.

There is nothing in any of the authorities cited by counsel which affects the situation or the cases cited by the attorneys for the Trustee in their letter to you of May 29th, last, and we respectfully submit that the charges for fees and expenses should be disallowed.

Respectfully submitted,

ORRICK, DAHLQUIST, NEFF
& HERRINGTON, and

STERLING CARR,

By /s/ STERLING CARR,

Attorneys for Trustee.

cc: Pembroke Gochnauer, Esq.

Attorney at Law,

111 Sutter Street,

San Francisco, California.

Rogers and Clark, Esqs.

Attorneys at Law,

111 Sutter Street,

San Francisco, California.

[Endorsed]: Filed June 4, 1952.

Pembroke Gochnauer
Attorney at Law
One Eleven Sutter Street
San Francisco 4
EXbrook 2-1869

June 3, 1952.

Mr. C. C. Evensen, Clerk,
District Court of the United States,
Northern District of California,
Post Office Box 1047,
Sacramento, California.

Dear Mr. Evensen:

Re: Coastal Plywood & Timber Company,
No. 12223. Memorandum of costs and
disbursements

Yesterday I received in the mail a copy of Mr. Carr's letter to you dated May 29, 1952, setting forth his objections to the memorandum of costs heretofore filed in the above matter. I offer the following comments concerning the objections and authorities set forth in his letter.

Transcript of remarks of the Court: When I wrote you on May 29, 1952, I did not know that counsel for the trustee had any objection to this item. The item covers the remarks of the Court at the conclusion of the hearing on February 15, 1952, which he announced were in the nature of "oral findings" although he directed me to prepare findings of fact and conclusions of law. Obviously, it was necessary for me to have a transcript of these remarks in order to prepare the formal findings

of fact which were subsequently filed in the proceeding. The item is properly allowable under the Judicial Code (28 U.S.C.A. Section 1920) which lists as taxable costs—"fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." This provision was added to the Code in 1948.

Witness fees and mileage: The authorities cited in Mr. Carr's letter, with the exception of The Petroleum case, merely support the rule that parties to the proceeding are not entitled to witness fees when testifying in their own behalf. As indicated in my letter of May 29, this was not the case here and no witness fees have been claimed for the petitioners who appeared as witnesses in their own behalf at the trial, February 11 to 15, 1952, inclusive. The case of *The Petroleum, etc.*, 41 Fed. 2d 268, holds that witness fees may be allowed and taxed as costs where the witnesses appear voluntarily, and without subpoena.

Respectfully yours,

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners.

cc: Orrick, Dahlquist, Neff & Herrington,
Sterling Carr,
Attorneys for Trustee.
Rogers and Clark,
Attorneys for Debtor.

[Endorsed]: Filed June 4, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL FROM ORDER REINSTATING
EMPLOYEES WITH BACK PAY, FILED
MAY 16, 1952

Now comes Fred G. Stevenot, Trustee of Debtor above named, and Appellant above named, and sets forth a statement of the points upon which appellant intends to rely on such appeal, as follows:

1. The District Court erred in denying appellant's motions to dismiss the petition for reinstatement of employees with back pay.

2. The District Court erred in including in said Order last above referred to and filed herein upon the 16th day of May, 1952, the provision requiring said Trustee to re-employ said petitioners named in said Order, and further in ordering that said Trustee pay to said petitioners and each of them the amounts set forth in said Order. The said District Court further erred in ordering and directing said Trustee to pay to said petitioners any sums or amounts whatsoever.

3. The District Court erred in granting the petition of said petitioners and further in ordering said Trustee to re-employ and reinstate said employees in their former or any other positions or employments.

4. The District Court erred in granting the peti-

tion of petitioners for specific performance of their contract for personal services.

5. The District Court erred in not holding that the original contract of employment contained on the back of the stock certificate issued to each of petitioners was amended and changed by the Amended Bylaws adopted by Debtor on September 10, 1950.

6. The District Court erred in holding that Section 7 of Article III of said Bylaws, duly and regularly adopted by the said Stockholders of said Debtor on the 10th day of September, 1950 and reading as follows, to wit:

“Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation.”,

did not give to and empower said General Manager of said Debtor full and uncontrolled right, power and authority to employ and discharge agents and employees of said Debtor at any time and for any reason or purpose whatsoever and which to him seemed best.

7. The District Court erred in not holding that

the failure of petitioners to offer their stock to Debtor, as required by its Articles of Incorporation and/or Bylaws, before granting to a third party an option to purchase the same constituted a breach of contract with Debtor which entitled Debtor and appellant herein to discharge petitioners and each of them from their and each of their employment with Debtor.

8. The District Court erred in substituting its judgment for that of the Trustee, appellant herein, and his General Manager in the ordinary operations of Debtor.

Dated this 3rd day of June, 1952.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ GEORGE HERRINGTON,

/s/ STERLING CARR,

Attorneys for Said Trustee.

[Endorsed]: Filed June 5, 1952.

June 6th, 1952.

Pembroke Gochnauer, Esq.,
Attorney at Law,
111 Sutter Street,
San Francisco 4, Calif.

In re: Coastal Plywood & Timber Co.,
Bk. No. 12223

Dear Sir:

The taxation of costs was continued to this date. I taxed costs in the sum of \$4.00. I disallowed

the cost of the transcript of remarks of the court at the conclusion of the argument, for the reason that it was not ordered by the Court, but was ordered for the convenience of counsel.

I disallowed the witness fees and mileage on the ground that they were parties in interest (nominally plaintiffs), and consequently not entitled to witness fees or mileage.

The remaining items totaling \$4.00 was taxed and allowed.

Very truly yours,

C. W. CALBREATH,
Clerk.

By C. C. EVENSEN,
Deputy Clerk.

cc: Sterling Carr, Esq.,
1 Montgomery Street,
San Francisco 4, Calif.

[Title of District Court and Cause.]

NOTICE OF MOTION BY PETITIONERS TO
REVIEW TAXATION OF COSTS BY
CLERK AND TO RETAX COSTS

To Fred G. Stevenot, Esq., Trustee of the Estate of
The Above-Named Debtor, Coastal Plywood &
Timber Company, and Sterling Carr, Esq.,
Crocker First National Bank Building, San
Francisco, California, and Messrs. Orrick,
Dahlquist, Neff and Herrington, 405 Mont-

gomery Street, San Francisco, California, His Attorneys:

You and Each of You Will Please Take Notice that on Friday, the 13th day of June, 1952, at the hour of two o'clock p.m. of said day, or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled Court, the Honorable George B. Harris presiding, in the United States Post Office Building, San Francisco, California, the petitioners, J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmerman, Edwin H. Jasmann, Frank Sutton, George F. Scott and John E. Vick, will move said Court, under Rule 54(d) of the Rules of Civil Procedure and Rule 9(e) of the Rules of Practice of said Court, to review the action of the Clerk of said Court on June 6, 1952, in taxing costs of petitioners and to retax said costs. Petitioners do hereby appeal from the rulings of said Clerk on such taxation in disallowing the following items of petitioners' Memorandum of Costs and Disbursements, to wit:

1. Cost of Transcript of Remarks of the Court at Conclusion of Argument, Friday, February 15, 1952.....\$ 4.00
2. Witness Fees and Mileage 199.20

Said motion will be made upon the grounds that the disallowance of said first item of costs was improper because said Transcript was necessarily obtained for use in the above-entitled proceeding; and that the disallowance of witness fees and mileage

was improper because said witness fees and mileage relate to the court attendance of petitioners as witnesses of counsel for the Debtor's Trustee in the above-entitled proceeding, and not as witnesses in their own behalf, and to the court attendance of one Wesley Cross as a witness, who was subpoenaed and paid the amounts claimed in said Memorandum of Costs and Disbursements and who was not a party to the above-entitled proceeding.

Dated: June 9, 1952.

/s/ PEMBROKE GOCHNAUER,
Attorney for Petitioners.

Receipt of copies of the within Notice of Motion is hereby admitted this 9th day of June, 1952.

/s/ STERLING CARR,
Attorney for Trustee.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ STERLING CARR,
Attorneys for Trustee.

ROGERS AND CLARK,
By /s/ H. SCOTT GOODFELLOW,
Attorneys for Debtor.

Good cause having been shown, it is hereby Ordered that the time of service of copies of the within Notice of Motion as provided by Rule 6(d) of the Rules of Civil Procedure be shortened, and that the hearing upon the motion of the above-named petitioners to review taxation of costs by clerk and to

retax costs be set for Friday, the 13th day of June, 1952, at the hour of two o'clock p.m.

Dated: June 9, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 10, 1952.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO
RETAX COSTS

Petitioners' motion to retax costs having been argued, briefed and submitted for ruling,

It Is Ordered that the motion be, and the same hereby is, allowed as prayed for.

Dated: July 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

28 U.S.C.A. 1920;
Petroleum, etc.,
41 F. 2d 268.

[Endorsed]: Filed July 11, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER
RETAXING COSTS

To the Clerk of the Above-Entitled Court, and to J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott, and John E. Vick, and to Pembroke Gochnauer, Esq., Their Attorney, and to Messrs. Rogers and Clark, Appearing as Counsel for Debtor:

You, and each of you, Will Please Take Notice That Fred G. Stevenot, the duly and regularly appointed, qualified and acting Trustee of the property and assets of Debtor above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain "Order Granting Motion to Retax Costs," entered in the above-entitled proceedings on the 11th day of July, 1952, the Honorable George B. Harris presiding.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON, and
STERLING CARR,

By /s/ STERLING CARR,
Attorneys for Trustee.

[Endorsed]: Filed July 18, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL FROM THE ORDER GRANT-
ING MOTION TO RETAX COSTS, FILED
HEREIN ON JULY 11, 1952

Now comes Fred G. Stevenot, Trustee of Debtor above named, and Appellant above named, and sets forth a statement of the points upon which appellant intends to rely on such appeal as follows, to wit:

1. The District Court erred in denying appellant's motion to retax costs on the proceedings to compel the reinstatement of appellees with back pay.

2. The District Court erred in allowing the items of \$4.00 for the transcript of remarks of the Court at the conclusion of the argument on Friday, February 15, 1952.

3. The District Court erred in allowing witness fees and mileage as per Schedule I attached to the costs bill, filed herein and amounting to \$199.20.

Dated this 21st day of July, 1952.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON, and

STERLING CARR,
By /s/ STERLING CARR,
Attorneys for Said Trustee.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 22, 1952.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 12223

Before: Hon. George B. Harris, Judge.

In the Matter of
COASTAL PLYWOOD & TIMBER COMPANY,
a Corporation,

Debtor.

In Proceedings for the Reorganization
of a Corporation

REPORTER'S TRANSCRIPT HEARING ON
PETITION FOR REINSTATEMENT OF
EMPLOYEES WITH BACK PAY

Monday, February 11th, 1952

* * *

Q. Did you offer your stock to the company be-
fore you gave this option to Mr. Hampton?

Mr. Gochnauer: Objected to as incompetent, ir-
relevant and immaterial.

The Court: Overruled.

A. No, I didn't.

* * *

Mr. Clark: I will give you a stipulation on the
figures as I have them. As of June 30, and I don't
think they have substantially changed, they are
these: That out of 273 employees which were em-
ployed by the company at that time only 90 at this

writing are stockholders, and of those 53 have optioned their stock to Hampton. If you want that stipulation I will give it to you.

The Court: I think you might have that in writing.

Mr. Clark: Very well, I will prepare it in writing.

* * *

Mr. Clark: Mr. Cross, do I understand that if this had been left to you to make the decision solely from the standpoint of job performance, you would not have laid these men off?

Mr. Carr: I object to that as incompetent, irrelevant and immaterial.

Mr. Clark: I will submit it, Your Honor.

The Court: Overruled.

A. If I had been in Mr. Dyke's shoes, and the man he is, I probably would have gone ahead and done it, but as I stated, I have Christian beliefs in the matter and therefore I would not.

* * *

[Endorsed]: Filed May 23, 1952.

[Title of District Court and Cause.]

**HEARING ON MOTION TO RETAX COSTS
REPORTER'S TRANSCRIPT**

Monday, July 7, 1952

The Clerk: Matter of Coastal Plywood & Timber Company, motion to retax costs.

Mr. Gochnauer: Your Honor, I understand the papers pertaining to this matter are not before the Court. I gave Mr. Magee my office copy of the cost bill and certain other documents. The matter was submitted to the Clerk in Sacramento, this being a Sacramento filing, and it was handled through correspondence with Mr. Evensen. I will give you my office copies of that correspondence.

The Court: All right.

Mr. Gochnauer: The motion to retax pertains to three items in the cost bill, the clerk having disallowed the entire bill with the exception of \$4 which covers certain affidavits, and that is all.

The first item disallowed to which we have filed this motion is a copy of the transcript of the Court's remarks at the conclusion of the hearing on February 15th. The portion of the transcript which I ordered were the Court's remarks in which the Court announced orally its findings, and the purpose of ordering them, of course, was to enable me to prepare written findings of fact in accordance with the Court's remarks.

I called attention to the clerk in Sacramento through a letter of June 3, 1952, that this item was properly allowable under the language of the statute, Judicial Code USCA Section 1920 which lists as taxable costs the fees of the court reporter or any part of the stenographic transcript necessarily obtained for use in the case, and pointed out to him that that was the reason that that should be approved.

The Court: The clerk allowed \$4.00?

Mr. Gochnauer: Yes, Your Honor, I think that is the total of those minor items on page 1 of the cost bill approved.

Mr. Carr: Well, no, the clerk didn't allow you—if I understand His Honor——

Mr. Gochnauer: He allowed the \$4.

The Court: Transcript remarks of Court at the conclusion of hearing, \$4. The clerk allowed that?

Mr. Gochnauer: No. If you will look at the other items on page 1 of the cost bill, I think they aggregate \$4. He allowed the other items but not that one, and Mr. Evensen's letter, which I believe you have a copy of, says that he disallowed that item.

The Court: Yes, I have it.

Mr. Gochnauer: That is No. 1.

No. 2 is the witness fee for the mileage for the witness Wesley Cross who appeared at the main hearing. Your Honor will recall he was foreman-supervisor of most of these petitioners.

The Court: Yes.

Mr. Gochnauer: That witness fee and mileage was actually paid by myself to Mr. Cross at the time he was subpoenaed. The clerk I think was misled by Mr. Carr's objections—I believe you have a copy of his letter to the clerk before you in which he said that all of the witness fees claimed in the cost bill were those of petitioners. In that Mr. Carr overlooked the fact that Cross' fee was included.

In his letter to the clerk in Sacramento dated June 3, 1952, replying to my affidavit and letter of May 29th, he says:

“The witnesses in question were all petitioners and direct parties to the action and as such claiming witness fees and costs of transportation in their own proceeding.”

As to Mr. Cross he was of course mistaken. He was not.

Third, the final, if Your Honor please, and major item we ask to revise pertains to mileage and witness fees of the eleven petitioners who appeared in this court on May 1st to give testimony as to the amount of wages lost in order that Your Honor might fix in the final judgment the exact amounts of money owed.

In that connection I filed with the cost bill my affidavit, which is rather short, and I will read it:

“Pembroke Gochnauer, being first duly sworn, deposes and says:

“Affiant is the attorney for petitioners in the Petition for Reinstatement of Employees with Back Pay in the above-entitled proceedings. Said petition came on for hearing before the above-entitled Court, Honorable George B. Harris presiding, on the 11th, 12th, 13th, 14th and 15th days of February, 1952, and an ‘Interlocutory Order Reinstating Employees with Back Pay,’ directed to Debtor’s Trustee, was entered in the above-entitled proceedings on February 15, 1952. Since entry of said Order, the Debtor’s Trustee has failed to reimburse petitioners for any of the wages lost by them, as set forth in and as directed by said order. Although the amounts of said wages lost were ascertainable from Debtor’s records, without the necessity of

further appearance of petitioners as witnesses before said Court, the Debtor's Trustee refused to stipulate with petitioners as to the amounts of said wages, and consequently your affiant was compelled to require each of the petitioners to appear before said Court on May 1, 1952, for a hearing to enable the Court to determine the amounts of said wages. At the commencement of said hearing, George Herrington, Esq., one of the attorneys for the Debtor's Trustee, announced in open court that the Debtor's Trustee was then ready to stipulate to the amounts of said wages lost by each of the petitioners, and said amounts were thereupon agreed to and fixed by stipulation between counsel for the respective parties. Thereafter, at said hearing, said Herrington called each of the petitioners to the stand as witnesses for the Trustee, and examined each of them with respect to his efforts to obtain other employment during the period to which said amounts of lost wages relate. None of the petitioners testified at said hearing in his own behalf, but each of them was called by the adverse party to testify as to his efforts to mitigate or lessen the amount of his own loss."

Mr. Carr's objection to that, Your Honor, is that a party to the action is not by law permitted to obtain witness fees and mileage. As Your Honor undoubtedly knows, the reason for that is that a party to an action is interested in the management of the case and normally attends throughout.

I cited the clerk to that case in Michigan, which, so far as I know, has never been overruled, that

where the party appears not for the purpose of maintaining the action, but solely for the purpose of giving evidence on a particular day, the rule does not apply because the reason for the rule does not apply. The reason a party is not ordinarily permitted witness fees is that he is interested in the management of the case and that he has the election as to whether or not he shall appear and testify, and the cases so hold.

In reply to my affidavit, Mr. Carr wrote the clerk at Sacramento the following letter:

“Dear Mr. Evensen:

“Replying to Mr. Gochnauer’s affidavit and letter to you of May 29th, last, in the above matter:

“The witnesses in question were all petitioners and direct parties to the action”——

They were all petitioners except Cross——

“and as such claiming witness fees and costs of transportation in their own proceeding. They were brought to court by Mr. Gochnauer, their own attorney, and were not subpoenaed by the defendants,”——

That, of course, is correct——

“and the testimony elicited from them by Mr. Herrington was on cross-examination to ascertain whether they had or could have secured employment during the period in question for which they were seeking damages from the Trustee.”

Mr. Carr is mistaken about that, Your Honor. You will recall that each of these people were called by Mr. Herrington and examined on the issue as to whether or not they had sought to mitigate their own loss. Reading on:

“They voluntarily appeared in court after the Trustee through his attorneys had agreed to take their deposition in Cloverdale.”

It would have been more accurate to say, “had proposed to take their depositions.”

“Such offer was rejected by Mr. Gochnauer who stated that he preferred to have them present in court. The fact that no witness fees are claimed for these particular parties for their appearance during the trial in February of this year is immaterial on this present proceeding, for counsel evidently recognized that such a charge would have been improper.”

Reading on:

“The parties in question were not called to the stand by Mr. Herrington as witnesses for the Trustee, but were called under cross-examination as aforesaid to establish whether or not such damages were or might have been minimized.”

Your Honor will recall that I called the first witness, Mr. Norberg to the stand, at which time Mr. Herrington offered to stipulate to the amount of the losses of each witness, and I accepted that stipulation. Your Honor then said, “We will hear evidence as to mitigation.” And I said that we desired to

offer no evidence on the point whatever. Mr. Herrington then took on Mr. Norberg and each of the eleven petitioners and asked him about his efforts to get other work. He did not announce whether he was calling him under Rule 43 (b); but whether he was calling him that way or not, the witness was certainly presented as his own witness, and had he called him under 43 (b) as his witness, he would have been required to pay the witness fee and mileage. No claim is made for any witness fee for any of these petitioners at the trial of the case, but I submit that having to appear here to assist the Court in fixing the amount of damages and then after their appearance having a stipulation which I have previously cited agreed to, then the witnesses being presented solely to testify as to the trustee's defense, there is no reason why they should not properly be allowed as costs. They actually appeared. They have not claimed here loss of wages on the days on which they appeared.

I submit, if Your Honor please, the cost bill as filed is entirely proper.

I will be glad to give Your Honor my office copies of the rest of the correspondence.

Mr. Carr: You have given His Honor that copy of my letter that you read?

Mr. Gochnauer: I did.

Mr. Carr: May it please Your Honor, in reference to the \$4, a very small item, the Clerk's letter is somewhat misleading to this extent. He says, "I attached costs in the sum of \$4. I disallowed the cost of the transcript of the remarks of the Court

at the conclusion of the argument for the reason that it was not ordered by the Court but was ordered for the convenience of counsel.”

I noted that there is only one charge there for \$4, so it is difficult to understand just what he means. But, of course, the law is that any transcripts ordered for the convenience of counsel as shown by Mr. Gochnauer's affidavit are not taxable. That was definitely decided by the Supreme Court in *Pine River Company vs. U. S.*, 186 U. S. 279, where it was held, as it has been held in a number of cases, that Section 983 did not include transcript of evidence for the personal use of counsel in preparing the record for the Appellate Court.

That case was cited with approval by Judge Goodman in 1947 in the case of *Burnham Chemical Company vs. Borad Consolidated Company*, 7 F.R.D., 341, Subdivisions 3 and 4. That is a case in which counsel did exactly what Mr. Gochnauer did here: ordered it for his own personal convenience.

As to the witnesses, Your Honor, probably the best evidence of why they were brought here is from the transcript. I am reading from page 518, commencing with line 18:

“We are here today on the motion that he file supersedeas bond, and preliminarily to that we are here to ascertain the amount of wages lost by these petitioners within the meaning of Your Honor's order of February 15, 1952.”

And he said,

“I had hoped, Your Honor, until early this week that this matter would all be settled inso-

far as the amount of wages lost was concerned, but I found that that could not be, so that I had no alternative but to bring the eleven people down here. They are here.”

Further on at page 519, commencing with line 23, with respect to seeking other employment:

“It is my understanding that we are here today because of a desire to cross-examine these people as to their efforts in obtaining outside employment.”

Further on, on that same subject, page 520, line 19:

“Mr. Gochnauer: I do not contend that he”——

referring to counsel——

“is foreclosed from cross-examining. In order that these proceedings may not be drawn out interminably, I shall not object to his questions on that.”

Further on, on page 522, line 4:

“Mr. Gochnauer: May I proceed to produce the witnesses?”

“The Court: I think I understand pretty much the issue, counsel, and with that statement. Do you have any further statements, gentlemen?”

On line 10 Mr. Gochnauer called Mr. Norberg.

Page 523, line 24:

“The question then before the Court is mitigation. You may proceed on that phase.”

So we state, may it please Your Honor, that these witnesses were called here. We did not subpoena them; they were brought down to testify as to this damage which they suffered, and in that question of damages was involved the question of mitigation, which of course must be brought out or raised by the defendant or respondent on cross-examination. That is exactly what they did here, and the authorities are cited. You have my letter, I believe?

The Court: Yes, I have your letter.

Mr. Carr: Which sets forth the authorities. In that first case, *Picking vs. Pennsylvania*, cited there, it holds generally a party is not entitled to witness fees and mileage on his own attendance. He came here to prove his case. Your Honor will recall that this case was opened in order to permit them to prove the amount of damages that they suffered. The fact that Mr. Herrington may have stipulated what the witnesses would have earned had they been employed during the period in question of course is just the same as proof. He did not obviate and did not intend to obviate the question of cross-examination. So with those authorities, Your Honor, it would seem to us that these parties were not entitled to costs. We did not bring them here. We would never have had to examine them at all except that they were making these claims for amounts of wages for the time they were unemployed after their dismissal, so that if they had not elected to prove or claim those amounts, then of course it would not have affected the defendant in

the least; but inasmuch as they elected to claim them, they of course subjected themselves to cross-examination and they are not witnesses in the true sense for the defendant. They are their own witnesses, proving their case, subjecting themselves to cross-examination. And if that be true, any witness cross-examined would become entitled, immediately, even though he was a party to the action, would become immediately entitled to costs.

I respectfully submit, Your Honor, that the points are well taken.

Mr. Gochnauer: May I reply briefly, Your Honor? In one of those letters to Mr. Evensen which you have before you, I pointed out to him that with respect to that \$4 item on the transcript, it was within the language of the Judicial Code. I think my letter states that that is a recent amendment to the Judicial Code. I apprehend that the cases that Mr. Carr is talking about were prior to that amendment. I think it appears——

Mr. Carr: When was the amendment?

Mr. Gochnauer: I think it is in my letter, Mr. Carr.

Mr. Carr: Judge Goodman's decision in this Burnham case was in '47, I think.

Mr. Gochnauer: We are talking about the statute here. I think it was in '48 that this language was incorporated.

With respect to the transcript Mr. Carr just read, he only read you part of it, and if the Court would like to hear it, I will borrow his copy and read you the rest.

The Court: All right.

Mr. Gochnauer: May I have that?

Mr. Carr: Yes, certainly.

Mr. Gochnauer: Page 519.

The Court: Counsel, you take the position that the amounts of wages were ascertainable from the Debtor's records?

Mr. Gochnauer: That is correct, and that any matter as to mitigation on that was a matter of defense, and I was forced to bring these people down here so that they could have the privilege of cross-examining them. When they got down here, in my opening remarks, I did not anticipate that they would stipulate, and I therefore said that they were here so they could cross-examine him, but when Mr. Herrington then stipulated to the amounts, I had no further testimony to offer.

Mr. Carr: Of course you don't mean that you could foreclose our cross-examination when mitigation could only be proved by mitigation, and mitigation was raised.

Mr. Gochnauer: The question, Mr. Carr, is whether you called them for cross-examination or whether you called them as your witnesses.

Mr. Carr: That would make no difference; if we did call them as our witnesses, they were our witnesses for cross-examination.

Mr. Gochnauer: If you called them as your witnesses for cross-examination, they were still your witnesses.

Mr. Carr: No, they were for cross-examination; they were for cross-examination.

Mr. Gochnauer: I was there contending that he was foreclosed from cross-examination, but that in order that this proceeding might not be drawn out interminably, I did not object to his questioning on mitigation.

Mr. Carr: You could not have objected, because mitigation can only be shown by cross-examination, and the fact of what our books showed would not entitle you just from that fact to judgment; you would have nevertheless been obliged to put in proof of the amount of damages. You could not, because our books may have shown that the wages were at the time—that was not proof of what the wages might have been during the period in question.

Mr. Gochnauer: Reading from the transcript of that proceeding of May 1st, Your Honor. After my preliminary statement, I said:

“May I proceed to produce the witnesses?”

“The Court: I think I understand pretty much the issue, counsel, with that statement. Do you have any further statements, gentlemen?”

“Mr. Carr: No, I haven’t.

“The Court: You can proceed with the testimony.

“Mr. Gochnauer: I have been unable to get any stipulation, Your Honor.

“Mr. Herrington: Your Honor, may I make one suggestion? As far as the amounts claimed by these petitioners are concerned, Mr. Gochnauer has furnished us with the figures. We have checked them as far as the books of the company are concerned.

The difference is just picayunish, so far as I am concerned. I don't even care to go into the question of what these men could have earned because the difference between our books and their claims all told is so trivial that it isn't very much. For all practical purposes, they are identical.

"I think the only issue here is on mitigation of damages. Mr. Carr can enlighten you on that.

"The Court: Do I take it, gentlemen, that it will be stipulated by and between the parties hereto that the total amounts of the claim or claims of the respective parties hereto are stipulated to the amounts indicated by counsel for the petitioners?

"Mr. Herrington: I guess there is nothing before Your Honor showing the exact amount.

"The Court: Well, I assume you have some summary, have you?

"Mr. Herrington: —giving a statement, and that statement is satisfactory.

"Mr. Gochnauer: Your Honor, I wish that I had been able to obtain a stipulation earlier. I have not been able to obtain it on behalf of all counsel for the Trustee, and I am very glad to have it.

"The Court: Who must stipulate to the condition now?

"Mr. Gochnauer: Well, I assume now that Mr. Herrington is speaking for Mr. Carr also.

"Mr. Carr: In this situation, yes.

"The Court: Then I suggest, counsel, in aid of facilitating the hearing, the time of court and counsel, that you might make a summary or compilation of the total amount or amounts of the claims of

these petitioners or claimants and file same with the Court after the approval in writing of counsel.

“The question then before the Court is mitigation. You may proceed on that phase.

“J. W. NORBERG

a witness called on behalf of respondent, being first duly sworn, testified as follows:

“The Clerk: Please state your name, address and occupation to the Court.

“The Witness: J. W. Norberg, Cloverdale, tallyman.

“Mr. Gochnauer: If Your Honor please, I take it there is no obligation on my part to prove Mr. Carr’s contention.

“The Court: To what?

“Mr. Gochnauer: There is no obligation on our part, no part of our case, to prove that these people did seek other employment.

“The Court: You come into Court clothed with a certain presumption or prima facie showing, I would say, by reason of the fact these men have received unemployment compensation. I think the burden is upon the respondents here to take up the cross-examination if they are so advised.

“Mr. Gochnauer: Well, I have no examination in chief, if Your Honor please, because it is not part of my case. The issue of amount of damages was not presented by the pleadings in the original hearing, it was not testified to, there isn’t a word of testimony in the record on the subject.

“Mr. Herrington: If Your Honor please, I will

call Mr. Norberg as a witness on behalf of respondent.”

Mr. Carr: That is all right.

Mr. Gochnauer: “Direct Examination,” question by Mr. Herrington of Norberg, which shows cross-examination by me as to unemployment compensation, with direct examination by Mr. Herrington, and the same with respect to each of the eleven people.

Mr. Carr: That is all right; that is all right, Your Honor. They were called, as Your Honor said, for cross-examination. They set the standard of the case, the rule of the case. They were called for cross-examination.

The Court: The matter is submitted. May I have these documents left here?

Mr. Gochnauer: Yes, Your Honor, I have my own office copies.

The Court: They will be returned to you.

Mr. Carr: Is the cost bill in there?

The Court: Yes, I have everything.

Mr. Gochnauer: Yes. Thank you.

The Court: I will make a note that these are to be returned. Recess until two o'clock.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 19 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed September 17, 1952.

DEBTOR'S EXHIBIT F

Incorporated Under the Laws
of the State of Nevada

CLASS "A"

COMMON STOCK CERTIFICATE

Number 300

One Share

Coastal Plywood & Timber Company

This Certifies That.....is the owner of
One fully paid and non-assessable Share of the
Class "A" Common Capital Stock of

Coastal Plywood & Timber Company

of the par value of \$2,500 each, transferable on the
books of the company by the holder hereof in per-
son or by duly authorized Attorney, upon surrender
of this certificate properly endorsed.

The designations, preferences and relative par-
ticipating and other special rights of the company's
authorized classes of stock and the qualifications,
limitations or restrictions of such rights are con-
tained in Articles IV and V of the Amended Arti-
cles of Incorporation of the company, copies of
which are set forth on the reverse side of this cer-
tificate.

Restrictions upon the transfer of the Share rep-
resented by this certificate are contained in Article
IX of the Amended Articles of Incorporation of
the company, copy of which is set forth on the re-
verse side of this certificate.

In Witness Whereof, the said Corporation has
caused this certificate to be signed by its duly au-

Debtor's Exhibit F—(Continued)

thorized officers and its corporate seal to be here-
unto affixed this.....day of.....,
19....

.....,

President.

.....,

Secretary.

Articles IV and V of the Amended Articles of
Incorporation of Coastal Plywood & Timber Com-
pany provide:

Article IV.

The total number of shares of capital stock that
may be issued by this corporation is eight hundred
(800) shares of common stock divided into two
classes:

- (a) Four hundred (400) shares of Class
“A” stock of the par value of Twenty-
five Hundred Dollars (\$2,500.00) each;
- (b) Four hundred (400) shares of Class
“B” stock without nominal or par
value.

The Class “B” stock shall be distinguished from
Class “A” stock in that it shall have voting priv-
ileges in the election of Directors, only as set forth
in the succeeding Article V.

The Class “A” stock shall be entitled to receive
one-half of all dividends declared and to receive
one-half of any lawful distribution to stockholders
of assets of the corporation, whether such distribu-

Debtor's Exhibit F—(Continued)

tion be partial or complete and whether on final liquidation or otherwise and whether voluntary or involuntary.

The Class "B" stock shall be entitled to receive one-half of all dividends declared and to receive one-half of any lawful distribution to stockholders of assets of the corporation, whether such distribution be partial or complete and whether on final liquidation or otherwise and whether voluntary or involuntary. Any such dividends or distribution of assets, shall first be allocated equally, that is, one-half to Class "A" stock and one-half to Class "B" stock, and the share of each class shall then be apportioned equally among the stockholders, entitled to participate, of each class of stock.

Class "A" stock shall be issued, sold and transferred, whether by operation of law or otherwise, only in accordance with Article IX below.

The capital stock, after the amount of the subscription price, or par value, has been paid in, shall not be subject to assessment to pay the debts of the corporation.

Subscriptions for Class "A" stock may be accepted, subject to the provisions of Article IX herein, upon such terms and conditions as a majority of those directors elected by or representing Class "A" stockholders, may determine from time to time. No subscriber shall be entitled to a certificate of stock, until the subscription price is paid in full according to its terms, but so long as he is not in default in any of the terms of his subscription

Debtor's Exhibit F—(Continued)

agreement, he shall be entitled to vote as a Class "A" stockholder and shall be credited with any dividends declared on Class "A" stock, upon the purchase price of the stock.

Article V.

The number of Directors of this corporation is and shall be twelve (12). The holders of Class "A" stock shall be entitled to elect nine (9) of such Board of Directors and the holders of Class "B" stock shall be entitled to elect three (3) Directors. The terms in office and qualifications of all Directors shall be determined and set forth in the By-laws.

The number of Directors shall not be decreased or increased.

Article IX.

Article IX provides:

In view of the particular nature of this corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with Class "A" stock ownership, no shares of Class "A" stock may be issued except as follows:

One share of such stock only can be issued to or owned by any stockholder, and such stockholder must be an active employee, or a person acceptable to the Board of Directors as a future active employee of the Corporation.

It is further provided that:

(a) No owner of Class "A" stock may sell,

Debtor's Exhibit F—(Continued)

transfer or assign his share until and unless he first gives to the Corporation's President or Secretary written notice of his intention to sell, transfer or assign, setting forth in such notice the number of the certificate therefor and the name and residence of the person who is the holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors shall, for a period of 60 days after receipt of such written notice, have the sole and exclusive option of purchasing said share at the bona fide market value, as hereinafter defined. Payment for such share may be made by the Board of Directors by depositing said bona fide market value to the credit of such shareholder in any National Bank in Cloverdale, California, or San Francisco, California, to be paid to such shareholder by said bank upon the surrender of the certificate for said share of Class "A" stock properly endorsed; the Board shall give written notice of such deposit to the shareholder (by registered mail addressed to the person and address given in the stockholder's notice).

(b) Any person acquiring through will, descent, or by conveyance to take effect at death, or sale in the administration of any estate, any share of Class "A" stock of the Corporation shall be bound to give written notice of such acquisition to the President or Secretary of the Corporation, setting forth in such notice the number of the certificate, the name of the registered holder, and the name and residence

Debtor's Exhibit F—(Continued)

address of the person acquiring such share, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors, for a period of 60 days after receipt of such notice, shall have an exclusive option of purchasing such share at the bona fide market value, as hereinafter defined. The person so acquiring said share shall be notified of the exercise of said option and paid therefor in the manner prescribed in subparagraph (a).

(c) The purchaser of any share of Class "A" stock sold on execution or any other sale by operation of, or under authority of, law and the pledgee of any share of Class "A" stock before bringing any suit action, or proceeding or doing any act to foreclose his pledge shall first deliver to the President or Secretary of the Corporation written notice of such purchase or intention to foreclose, designating the number of the certificate and the name and residence address of the pledgee or the present holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors shall have the sole and exclusive option, for a period of 60 days after receipt of such notice, to purchase said shares at the bona fide market value, as hereinafter defined. Notice of the exercise of said option and payment to be accomplished in the manner hereinabove prescribed in subparagraph (a).

(d) On behalf of the Corporation the Board of

Debtor's Exhibit F—(Continued)

Directors shall have the sole and exclusive option to purchase from any holder of Class "A" stock who shall fail to report for work within sixty (60) days after the mailing to him, by registered mail, of written call to report for work, or who shall voluntarily or involuntarily cease to be employed by the Corporation by reason of discharge, retirement, resignation, disability or any other reason whatsoever, the share of stock of such holder at the bona fide market value, as hereinafter defined, for a period of 60 days from such failure to report or such cessation of employment. Notice of the exercise of said option and payment to be accomplished in the manner prescribed in subparagraph (a).

The specific provisions governing discharge, retirement, or disability shall be set forth in the By-laws.

(e) Shares of Class "A" stock shall give to the holder thereof no power to vote thereon and no right to dividends declared thereon subsequent to notification by the Corporation of its exercise of option to purchase under the terms and conditions defined in subparagraphs (a), (b), (c) and (d) above. Upon a stockholder's refusal to surrender his certificate, the Corporation, after making proper deposit of payment, may cancel such certificate.

(f) Shares of Class "A" stock acquired by the Corporation under the provisions of subparagraphs (a), (b), (c) and (d) above may be resold only to persons who are or agree to become employees of the Corporation who own no Class "A" stock, lim-

Debtor's Exhibit F—(Continued)

iting such resales to one share of Class "A" stock per employee.

(g) Bona fide market value is defined as follows:

(1) The Board of Directors and the person desiring to sell or foreclose may agree upon the bona fide market value at which the Corporation shall repurchase the stock.

(2) In the event said bona fide market value is not agreed upon it shall be determined by an appraisal made by a majority of three appraisers who shall be selected, one by any owner, holder or pledgee referred to in (a), (b), (c) and (d) above, one by the Board of Directors, and one by the two appraisers thus selected. If the two appraisers so selected shall not, within 20 days of their selection, agree upon the third appraiser, either party may apply, upon 5 days' written notice to the other, to any judge of any court of general jurisdiction in Sonoma or Mendocino counties, California, for the appointment of such third appraiser. The three appraisers so selected shall, within 20 days after the third appraiser is selected, appraise such shares and give written notice thereof to both parties, any expenses of appraisal to be paid one-half by each party. The Corporation's 60-day option to purchase, as set forth in (a), (b), (c) and (d) above, shall be extended by the time required for selection of appraisers and appraisalment.

(3) Bona fide market value shall be determined as of the date the Corporation receives the written notice referred to in subparagraphs (a), (b) and

Debtor's Exhibit F—(Continued)

(c) above, or sends the written notice provided for in subparagraph (d) above.

(h) If the Corporation fails to exercise or waives its option to purchase said stock as provided for in this Article IX, said stock may be sold or transferred at any price agreed upon between the holder and the transferee, provided only, that such transferee is an active employee holding no Class "A" stock or is a person acceptable to the Board of Directors as a future active employee of the Corporation.

For Value Received.....hereby sell, assign, and transfer unto.....the One Share of the Capital Stock represented by the within certificate, and do hereby irrevocably constitute and appoint.....Attorney to transfer the said Stock on the books of the within-named Corporation with full power of substitution in the premises.

Dated.....19...

.....

In presence of

.....

Notice: The signature of this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

Filed Feb. 13, 1952.

DEBTOR'S EXHIBIT G

In the Superior Court of the State of California
in and for the County of Sonoma

No. 34697, Dept No. 1

ALBERT L. SILVA, EDWIN VLASAK, JERRY
CLEARY, CECIL A. SMITH, WESLEY M.
REED, GLEN W. REED, C. FRANK TILES-
TON, JR., OSCAR ADAMS, LOUIS MERRY-
MAN, FRITZ PETERSON, SYDNEY T.
BOYCE, ALLEN L. WILLIAMS, R. ALTAR-
RIBA, EARL CONWAY, EDWIN BRANDT,
K. S. JOHANSON and GEORGE A. BRATS-
BERG,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation; and J. W. NORBERG,
MILO BARNHART, FLOYD JACKSON,
NELS SUNDEEN, DEWEY JONES, K. E.
BURKES, THOMAS A. SIMMONS, BILL
C. G. CLARK, FRANK ASTELL, as Direc-
tors, and L. M. HAMPTON,

Defendants.

COMPLAINT TO ENJOIN TRANSFER
OF STOCK

Plaintiffs complain of defendants and for cause
of action allege as follows:

Debtor's Exhibit G—(Continued)

I.

Defendant Coastal Plywood and Timber Company is a corporation organized and existing under the laws of the State of Nevada, maintaining its office and principal place of business in the Town of Cloverdale, County of Sonoma, State of California.

At the times herein mentioned, defendants J. W. Norberg, Milo Barnhart, Floyd Jackson, K. E. Burkes, Nels Sundeen, Dewey Jones, Frank Astell, Thomas A. Simmons and Bill C. G. Clark constituted and now constitute the Board of Directors of said corporation. Defendant J. W. Norberg is the president of said corporation.

Each of the plaintiffs is the owner and holder of one share of the capital stock of said corporation. The total number of shares of the capital stock of said corporation issued and now outstanding is 250 shares.

There is only one class of stock issued by said corporation and now outstanding.

II.

The original Articles of Incorporation of said corporation, as well as the amended Articles of Incorporation thereof, in Article IX thereof, contain the following provisions:

“In view of the particular nature of this corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with stock

Debtor's Exhibit G—(Continued)

ownership, no shares of stock may be issued except as follows:

“One share of stock only can be issued to or owned by any stockholder, and such stockholder must be an active employee, or a person acceptable to the Board of Directors as a future active employee of the corporation.”

It is further provided that:

“(a) No owner of stock may sell, transfer or assign his share until and unless he first gives to the corporation's President or Secretary written notice of his intention to sell, transfer or assign, setting forth in such notice the number of the certificate therefor and the name and residence of the person who is the holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the corporation the Board of Directors, shall, for a period of 60 days after receipt of such written notice, have the sole and exclusive option of purchasing said share at the bona fide market value, as hereinafter defined. Payment for such share may be made by the Board of Directors by depositing said bona fide market value to the credit of such shareholder in any National Bank in Cloverdale, California, or San Francisco, California, to be paid to such shareholder by said bank upon the surrender of the certificate for said stock properly endorsed; the Board shall give written notice of such deposit to the shareholder (by registered mail addressed to the person and address given in the stockholder's notice).”

Debtor's Exhibit G—(Continued)

Not more than one share of the stock of defendant corporation has been issued to any one stockholder and only one share of stock is owned by each of the stockholders of said corporation.

III.

Plaintiffs are informed and believe, and upon such information and belief allege the fact to be that one L. M. Hampton, with the knowledge and approval of a majority of the defendants, as solicited and procured written options to purchase the stock of at least fifty-one per cent of the stockholders of defendant corporation, and said stockholders intend to sell said stock to said L. M. Hampton and the said defendants threaten to and will, unless restrained by this Court, transfer said stock so optioned upon the books of defendant corporation and cause new certificates of stock of defendant corporation to be issued to the said L. M. Hampton for more than one share of said stock.

Said L. M. Hampton is not an active employee of said corporation nor does the said L. M. Hampton contemplate becoming an active employee of said corporation.

Plaintiffs further allege that in the event the said defendants permit the said L. M. Hampton or any other person to become the owner and holder of more than one share of the capital stock of said corporation and in the event the said defendants permit or cause more than one share of the capital stock of said corporation to be transferred and is-

Debtor's Exhibit G—(Continued)

sued to and in the name of one person, that the true intent and purpose of said corporation as expressed in its Articles of Incorporation will be subverted and destroyed and the rights of the plaintiff stockholders and others similarly situated with respect to said corporation and their interest therein will be destroyed and that great or irreparable injury to plaintiffs would result therefrom, and pecuniary compensation would not afford adequate relief to plaintiffs.

Plaintiffs are informed and believe and upon such information and belief allege the fact to be that defendant L. M. Hampton, with the knowledge and approval of a majority of the defendants who are directors of defendant Coastal Plywood and Timber Company has solicited the shareholders in said corporation to execute a proxy and extension of option in the words and figures as follows:

Proxy and Extension of Option

I, the undersigned, owner of one share of stock of Coastal Plywood & Timber Company, a Nevada corporation, hereby constitute and appoint L. M. Hampton, who now holds an option to purchase said share of stock, and Leslie C. Rogers, his attorney, or either of them, my proxy to vote said stock at any and all meetings of the stockholders of said corporation which may be held on or before June 14, 1953, with the same force and effect as I might do if personally present, hereby giving to each of my said proxies the right also to sign any

Debtor's Exhibit G—(Continued)

and all written consents to meeting, resolutions or other corporate matters; provided, however, that this proxy shall become effective only at such time as said L. M. Hampton, by virtue of this and other proxies or stock ownership, is entitled to exercise at least a majority of the voting power of said corporation.

Upon this proxy so becoming effective and upon payment to me of the sum of \$40.00 on or before June 30, 1951, to be applied on the option price of said stock, the time for the exercise of said option shall be extended and regranted for a period of two years from and after June 14, 1951.

This proxy is coupled with an interest and upon becoming effective is expressly made irrevocable.

All proxies heretofore made or given by me are hereby revoked, upon this proxy becoming effective.

Dated:

.....

Signature of Stockholder.

Witness:

.....

Plaintiffs are further informed and believe, and upon such information and belief allege the fact to be that defendant L. M. Hampton, with the knowledge and approval of a majority of the defendants directors of said corporation, has procured at least 51% of the holders of shares in said corporation to execute and deliver to him the said L. M. Hampton, documents of proxy and extension of option

Debtor's Exhibit G—(Continued)

in the same form as hereinabove written and that it is the intention of said stockholders so executing and delivering to L. M. Hampton said proxy and extension of option to sell and deliver to said L. M. Hampton their shares in said corporation.

Plaintiffs further allege that if defendant L. M. Hampton or his attorney Leslie C. Rogers is designated as proxy to vote 51% of the stock of said corporation at all or any meetings of the stockholders thereof, then and in that event the said defendant L. M. Hampton or his attorney Leslie C. Rogers will have the power to assume control of said corporation and to direct its activities and to elect a Board of Directors of said corporation and, unless restrained by this Court, will do so and in said event the true intent and purpose of said corporation as expressed in its Articles of Incorporation, will be subverted and destroyed and the rights of the plaintiff stockholders and others similiarly situated with respect to said corporation and their interests therein will be destroyed and that great or irreparable injury to plaintiffs would result therefrom and pecuniary compensation would not afford adequate relief to plaintiffs.

None of the plaintiffs in this action have executed a proxy and extension of option as set forth in this complaint or in any other form.

Wherefore, plaintiffs pray judgment as follows:

1. That the Court issue its order to show cause directed to the defendants requiring defendants to

Debtor's Exhibit G—(Continued)

appear and attend before the above Court to show cause why temporary restraining order should not be issued, restraining them from the acts contemplated as set forth in the foregoing complaint.

2. That the Court render its judgment enjoining the defendants from transferring capital stock upon the books of said corporation, or issuing shares of stock of said corporation contrary to the Articles of Incorporation thereof.

3. That the Court enjoin and restrain the defendants, their servants, attorneys or employees from soliciting the shareholders of said corporation to execute and deliver to L. M. Hampton proxy and extension of option as set forth herein or otherwise.

4. That the Court enjoin and restrain the defendant L. M. Hampton, his agents, servants, employees or attorneys from exercising proxies already executed and delivered to him in the form set forth in this complaint or otherwise.

5. That the Court enjoin and restrain the defendant corporation, its directors and officers from issuing to one person more than one share of the capital stock of said corporation.

6. For such other and further relief as to the Court shall seem proper in the premises.

7. For plaintiffs' cost incurred herein.

CLARENDON W. ANDERSON,
Attorney for Plaintiffs.

Debtor's Exhibit G—(Continued)

State of California,
County of Sonoma—ss.

R. R. Reeves, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled matter; that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

R. R. REEVES.

Subscribed and sworn to before me this 20th day of August, 1951.

[Seal] /s/ CLARENDON W. ANDERSON,
Notary Public in and for the County of Sonoma,
State of California.

Debtor's Exhibit G—(Continued)

(Copy)

In the Superior Court of the State of California
in and for the County of Sonoma

No. 34697, Dept No. 1

ALBERT L. SILVA, EDWIN VLASAK, JERRY
CLEARY, CECIL A. SMITH, WESLEY M.
REED, GLEN W. REED, C. FRANK TILES-
TON, JR., OSCAR ADAMS, LOUIS MERRY-
MAN, FRITZ PETERSON, SYDNEY T.
BOYCE, ALLEN L. WILLIAMS, R. ALTAR-
RIBA, EARL CONWAY, EDWIN BRANDT,
K. S. JOHANSON and GEORGE A. BRATS-
BERG,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation; and J. W. NORBERG,
MILO BARNHART, FLOYD JACKSON,
NELS SUNDEEN, DEWEY JONES, K. E.
BURKES, THOMAS A. SIMMONS, BILL
C. G. CLARK, FRANK ASTELL, as Direc-
tors, and L. M. HAMPTON,

Defendants.

SUMMONS

Action was taken in the Superior Court of the State
of California, in and for the County of Sonoma,
and the complaint was filed in the office of the
County Clerk of the County of Sonoma.

Debtor's Exhibit G—(Continued)

The People of the State of California Send Greetings to

Coastal Plywood and Timber Company, a corporation, and J. W. Norberg, Milo Barnhart, Floyd Jackson, Nels Sundeen, Dewey Jones, K. E. Burkes, Thomas A. Simmons, Bill C. G. Clark, Frank Astell, as Directors, and L. M. Hampton, Defendants;

You Are Hereby Directed to Appear and Answer the complaint in an action entitled as above, brought against you in the Superior Court, State of California, in and for the County of Sonoma, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiffs will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and the seal of said Superior Court this 27th day of August, 1951.

[Seal]

WILLIAM E. CLAUS,
County Clerk,

By KATHRYN PEDGRIFT,
Deputy Clerk.

Debtor's Exhibit G—(Continued)

In the Superior Court of the State of California
in and for the County of Sonoma

No. 34697, Dept. No. 1

ALBERT L. SILVA, et al.,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation, et al.,

Defendants.

DEMURRER

Come now the defendants Coastal Plywood and Timber Company, a corporation, and J. W. Norberg, Milo Barnhart, Floyd Jackson, Nels Sundeen and Dewey Jones, individually and as directors of said defendant corporation, and L. M. Hampton, and demurring to the complaint on file herein, for grounds of demur specify:

I.

Said complaint does not state facts sufficient to constitute a cause of action against defendants, or any of them.

II.

Said complaint is uncertain in this that it does not appear therein nor can it be ascertained therefrom

(a) why the Articles of Incorporation of the defendant corporation, specifically Article IX, can-

Debtor's Exhibit G—(Continued)

not be amended so as to permit the sale and transfer of the optioned stock to the defendant L. M. Hampton;

(b) whether the defendant Hampton intends to purchase said stock or whether the remaining defendants intend to transfer the same to the said Hampton prior to valid amendment of said Articles of Incorporation to permit such purchase and transfer;

(c) what was the true intent or purpose of said defendant corporation as expressed in its Articles of Incorporation, specifically Article IX thereof;

(d) how or in what manner such intent or purpose will be subverted or destroyed if more than one share of the capital stock of said corporation is transferred and issued to the said Hampton;

(e) how or in what manner any rights of the plaintiff stockholders, or any of them, with respect to said corporation or their interest therein, will thereby be destroyed;

(f) how or in what manner plaintiffs, or any of them, will be injured by the purchase by the said Hampton of the optioned stock or its transfer to him;

(g) why the said Hampton should be prevented from exercising the proxies held by him or from voting the stock represented thereby;

(h) why the said Hampton is not entitled to ex-

Debtor's Exhibit G—(Continued)

ercise said proxies and vote said stock in any manner authorized by law;

(i) how or in what manner or in what respects the said proxies held by Hampton fail to constitute him the lawful proxy for the stock in the defendant corporation represented thereby;

(j) how or in what manner the control of said corporation by the said Hampton or the power on the part of the said Hampton to direct its activities will subvert or destroy the true intent or purpose of said corporation or the rights of the plaintiff stockholders, or any of them;

(k) how or in what manner the control of said corporation by the said Hampton or the power on his part to direct its activities will subvert or destroy the rights of the plaintiff stockholders, or any of them, with respect to said corporation or their interests therein, or result in any injury to plaintiffs, or any of them; and

(l) how or in what manner plaintiffs or their stock interests will be injured by the said Hampton assuming control of said corporation or directing its activities.

III.

Said complaint is ambiguous in the same respect and for the same reasons as it is above stated to be uncertain.

IV.

Said complaint is ambiguous in the same respects

Debtor's Exhibit G—(Continued)

spects and for the same reasons as it is above stated to be uncertain.

Wherefore, these defendants pray that plaintiffs take nothing by virtue of their said complaint and that defendants, and each of them, be dismissed hence with their costs of suit herein incurred and with such other and further relief as to the Court may seem meet and equitable in the premises.

Dated: September 24, 1951.

WEBSTER V. CLARK,
H. SCOTT GOODFELLOW,
ROGERS and CLARK,

By WEBSTER V. CLARK,

Attorneys for Defendants Coastal Plywood and Timber Company, a Corporation; J. W. Norberg, Milo Barnhart, Floyd Jackson, Nels Sundeen, Dewey Jones and L. M. Hampton.

Debtor's Exhibit G—(Continued)

In the Superior Court of the State of California,
in and for the County of Sonoma

No. 34697—Dept. No. 1

ALBERT L. SILVA, EDWIN VLASAK, JERRY
CLEARY, CECIL A. SMITH, WESLEY M.
REED, GLEN W. REED, C. FRANK TILES-
TON, JR., OSCAR ADAMS, LOUIS MERRY-
MAN, FRITZ PETERSON, SYDNEY T.
BOYCE, ALLEN L. WILLIAMS, R. ALTAR-
RIBA, EARL CONWAY, EDWIN BRANDT,
K. S. JOHANSON, GEORGE A. BRATS-
BERG and R. R. REEVES,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation, and J. W. NORBERG,
MILO BARNHART, FLOYD JACKSON,
NELS SUNDEEN, DEWEY JONES, K. E.
BURKES, THOMAS A. SIMMONS, BILL
C. G. CLARK, FRANK ASTELL, as Directors,
and L. M. HAMPTON,

Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

Upon reading and examining the verified com-
plaint of plaintiffs on file in this action, and the
affidavit of R. R. Reeves, and it appearing to the
satisfaction of the Court therefrom that this is a

Debtor's Exhibit G—(Continued)

proper case for granting a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint and said affidavit be granted great injury will result to the plaintiff before the matter can be heard on notice; now therefore

It Is Hereby Ordered that the defendants be and appear before this Court in the Courtroom of Department One thereof at the hour of 10 o'clock a.m. on the 14th day of September, 1951, then and there to show cause if any they have why they and each of them, their agents, servants, employees and attorneys should not be enjoined and restrained during the pendency of this action

1. From amending Article IX of the Articles of Incorporation of Coastal Plywood & Timber Company to the extent that shares thereof may be sold and transferred by operation of law or otherwise without any restriction and any person may own any number of shares in said corporation.

2. Restraining the defendant, L. M. Hampton, his agents, servants, employees or attorneys from exercising proxys to vote shares of said corporation.

3. Restraining the defendant corporation, its directors and officers from issuing to one person more than one share of the capital stock of said corporation.

It Is Further Ordered that pending the hearing of this order to show cause that defendants and

Debtor's Exhibit G—(Continued)

their, and each of their agents, servants, employees and attorneys be, and they are enjoined and restrained from

1. Amending Article IX of the Articles of Incorporation of Coastal Plywood & Timber Company to the extent that shares thereof may be sold and transferred by operation of law or otherwise without any restriction and any person may own any number of shares in said corporation.

2. Restraining the defendant, L. M. Hampton, his agents, servants, employees or attorneys from exercising proxys to vote shares of said corporation.

3. Restraining the defendant corporation, its directors and officers from issuing to one person more than one share of the capital stock of said corporation.

It Is Further Ordered that a copy of the complaint and the affidavit of R. R. Reeves, if they have not already been served, be served on the defendants not later than the 8th day of September, 1951.

The bond on this restraining order is \$1,500.00, which bond has been presented to the Court and approved at the time of signing this order.

Dated: This 7th day of September, 1951.

DONALD GEARY,

Judge of the Superior Court.

Debtor's Exhibit G—(Continued)

In the Superior Court of the State of California
in and for the County of Sonoma

No. 34697—Dept. No. 1

ALBERT L. SILVA, EDWIN VLASAK, JERRY
CLEARY, CECIL A. SMITH, WESLEY M.
REED, GLEN W. REED, C. FRANK TILES-
TON, JR., OSCAR ADAMS, LOUIS MERRY-
MAN, FRITZ PETERSON, SYDNEY T.
BOYCE, ALLEN L. WILLIAMS, R. ALTAR-
RIBA, EARL CONWAY, EDWIN BRANDT,
K. S. JOHANSON, GEORGE A. BRATS-
BERG and R. R. REEVES,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation, and J. W. NORBERG,
MILO BARNHART, FLOYD JACKSON,
NELS SUNDEEN, DEWEY JONES, K. E.
BURKES, THOMAS A. SIMMONS, BILL
C. G. CLARK, FRANK ASTELL, as Direc-
tors, and L. M. HAMPTON,

Defendants.

AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER

State of California,
County of Sonoma—ss.

R. R. Reeves, being duly sworn, says:

I am one of the plaintiffs in the above action.

Debtor's Exhibit G—(Continued)

Subsequent to the filing of the complaint herein and on the 28th day of August, 1951, the Board of Directors of defendant Coastal Plywood and Timber Company held a meeting at the office of said corporation, and at said time passed a resolution in the following form:

Resolution Amending Articles

(Authorizing Amendment to Articles of Incorporation and holding of stockholders meeting September 9, 1951.)

Resolved, by the Board of Directors of this corporation, Coastal Plywood & Timber Company, a Nevada corporation, that Article IX of the articles of incorporation of this corporation be amended to read as follows:

Article IX

“Share of stock of this corporation may be sold and transferred by operation of law or otherwise without any restriction, and any person may own any number of said shares.”

and

Resolved, Further, that the Board of Directors of this corporation hereby declares that said amendment is advisable and hereby calls a meeting of the stockholders of this corporation, to be held on the 9th day of September, 1951, at the hour of 10:00 o'clock a.m., of said day, at the Druid's Temple on the west side of West Street, between First and Second Streets, in Cloverdale, Sonoma County, Cali-

Debtor's Exhibit G—(Continued)

fornia, for the purpose of considering and acting upon such amendment; and

Resolved, Further, that the President of this corporation be and he is hereby designated to give notice of said meeting of stockholders in the manner prescribed by law.

Pursuant to said resolution, the president of said corporation has issued a call for a stockholders meeting of said corporation to be held on the 9th day of September, 1951, at the hour of 10:00 o'clock a.m. of said day, and that unless restrained from so doing and under the guidance and direction of the officers and directors of said corporation, affiant believes that said corporation and its stockholders will hold said meeting and amend Article IX of the Articles of Incorporation of defendant Coastal Plywood & Timber Company as set forth in the foregoing resolution.

Time does not permit a motion for preliminary injunction after notice and prior to the 9th day of September, 1951.

Affiant further alleges that an amendment to Article IX of the Articles of Incorporation of defendant Coastal Plywood & Timber Company as above set forth would be in violation of the rights of plaintiff's in this action, respecting the subject of the action, and would tend to render any judgment herein ineffectual and cause great or irreparable injury to the plaintiffs before the matter can be heard on notice. That a restraint on the proposed actions of the defendant's is further necessary to

Debtor's Exhibit G—(Continued)

prevent a multiplicity of judicial proceedings within the framework of this case and otherwise.

Wherefore, affiant prays that the above court issue its Temporary Restraining Order enjoining the defendants herein from holding a stockholders meeting of the stockholders of the Coastal Plywood & Timber Company on the 9th day of September, 1951, restraining said defendants from amending Article IX of the Articles of Incorporation of defendant Coastal Plywood & Timber Company in the manner and form specified in the resolution herein mentioned.

That in conformity with the prayer of the verified complaint on file herein the above court enjoin and restrain defendant L. M. Hampton or his agents, servants, employees or attorneys from exercising proxies to vote the stock of defendant Coastal Plywood & Timber Company at a stockholders meeting on September 9, 1951, or at all.

R. R. REEVES.

Subscribed and sworn to before me this 5th day of September, 1951.

[Seal] CLARENDON W. ANDERSON,
Notary Public in and for the County of Sonoma,
State of California.

Debtor's Exhibit G—(Continued)

In the Superior Court of the State of California
in and for the County of Sonoma

No. 34697—Dept. No. 1

ALBERT L. SILVA, EDWIN VLASAK, JERRY
CLEARY, CECIL A. SMITH, WESLEY M.
REED, GLEN W. REED, C. FRANK TILES-
TON, JR., OSCAR ADAMS, LOUIS MERRY-
MAN, FRITZ PETERSON, SYDNEY T.
BOYCE, ALLEN L. WILLIAMS, R. ALTAR-
RIBA, EARL CONWAY, EDWIN BRANDT,
K. S. JOHANSON, GEORGE A. BRATS-
BERG and R. R. REEVES,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation, and J. W. NORBERG,
MILO BARNHART, FLOYD JACKSON,
NELS SUNDEEN, DEWEY JONES, K. E.
BURKES, THOMAS A. SIMMONS, BILL
C. G. CLARK, FRANK ASTELL, as Direc-
tors, and L. M. HAMPTON,

Defendants.

POINTS AND AUTHORITIES ON TEMPO-
RARY RESTRAINING ORDER

It appears from the complaint on file and from the affidavit in support of the temporary restraining order that the defendants, by their proposal to amend the articles of incorporation of Coastal Ply-wood & Timber Company, are about to act in viola-

Debtor's Exhibit G—(Continued)

tion of the rights of the plaintiffs respecting the subject matter of this action, and if the defendants carry out their purpose as suggested such action on their part would tend to render any judgment herein ineffectual.

A restraint upon the defendants is necessary to protect the rights of the plaintiffs.

Restraint of the proposed action of the defendants is likewise necessary to prevent a multiplicity of judicial proceedings. Sec. 526 C.C.P.

The amendment to the articles of incorporation of Coastal Plywood & Timber Company as proposed by the defendants will amount to the destruction or impairment of the vested or contract rights of plaintiff stockholders. This the corporation may not do.

The articles may not be amended so as to change the nature and purposes of the corporation or to create an entirely different kind of corporation. *Midland Co-operative Wholesale v. Range Co-operative Oil Ass'n.*, 274 N.W. 624. *Hueftle, et al., v. Farmers Elevator, et al.*, 16 N.W. (2nd) 855.

The fact that the right to amend the articles is reserved does not add to the power of the corporation to amend. The right so reserved is general in terms. It is not within the scope of the reserved power to amend to accomplish a change so fundamental and radical as that proposed. *Midland Co-operative Wholesale v. Range Co-operative Oil Ass'n.*, 274 N.W. 624. *Hueftle, et al., v. Farmers Elevator, et al.*, 16 N.W. (2nd) 855.

CLARENDON W. ANDERSON,
Attorney for Plaintiffs.

Debtor's Exhibit G—(Continued)

In the Superior Court of the State of California
in and for the County of Sonoma

No. 34697—Dept. No. 1

ALBERT L. SILVA, EDWIN VLASAK, JERRY
CLEARY, CECIL A. SMITH, WESLEY M.
REED, GLEN W. REED, C. FRANK TILES-
TON, JR., OSCAR ADAMS, LOUIS MERRY-
MAN, FRITZ PETERSON, SYDNEY T.
BOYCE, ALLEN L. WILLIAMS, R. ALTAR-
RIBA, EARL CONWAY, EDWIN BRANDT,
K. S. JOHANSON, GEORGE A. BRATS-
BERG and R. R. REEVES,

Plaintiffs,

vs.

COASTAL PLYWOOD AND TIMBER COM-
PANY, a Corporation, and J. W. NORBERG,
MILO BARNHART, FLOYD JACKSON,
NELS SUNDEEN, DEWEY JONES, K. E.
BURKES, THOMAS A. SIMMONS, BILL
C. G. CLARK, FRANK ASTELL, as Direc-
tors, and L. M. HAMPTON,

Defendants.

ORDER AMENDING TITLE

Upon application by counsel for plaintiffs it being made to appear to the Court that the name of R. R. Reeves, one of the plaintiffs herein, was omitted from the title of the complaint through clerical error and good cause appearing therefor;

Debtor's Exhibit G—(Continued)

It Is Ordered that in all proceedings hereafter taken the said R. R. Reeves appear as one of the plaintiffs.

Dated: September 7th, 1951.

DONALD GEARY,

Judge of the Superior Court.

Marked for identification.

DEBTOR'S EXHIBIT H

Minutes of Special Meeting of Stockholders of
Coastal Plywood & Timber Company
September 10, 1950

A special meeting of the stockholders of Coastal Plywood & Timber Company was held at the Grange Hall in Cloverdale, California, on the 10th day of September, 1950, pursuant to written notice of the time, place and purpose of said meeting duly given to all of the stockholders in accordance with the by-laws. The meeting was called to order by President Simmons at 10:45 a.m.

Thomas A. Simmons, President, with H. F. Tles-ton as Secretary, presided.

Roll call was taken at the door by the Secretary, assisted by Gladys Zimmerman in giving out the ballots and Edwin Vlasak in collecting the proxies.

Debtor's Exhibit H—(Continued)

Present were:

Stockholders Present in Person..... 98

Stockholders Present by Proxy..... 80

Total Stockholders Present178

Also present were: Mr. Kenneth Moynihan, Assistant Cashier, Bank of America; Mr. M. J. Micheletti, Assistant Vice President, Bank of America; Mr. A. L. Shannon, Attorney at Law; and Mr. Martin T. Dyke, General Manager of the Corporation.

The President stated the purpose of the meeting was to consider and act upon bylaws drafted by Attorney Mr. Shannon, and approved by Bank of America and RFC.

Mr. Scott made a motion that the names be torn from the top of the ballot and signatures omitted, making the ballot a secret ballot. Motion was seconded.

Mr. Sutton moved that the motion be amended to call for a separate vote on each section of the bylaws, instead of a blanket vote. Motion was seconded. Vote was taken after discussion and motion to amend was lost. Main motion was carried.

The proposed bylaws were read by the Secretary, per attached copy.

The President called upon Mr. Moynihan, who stated that the Bank and the RFC have a total investment of some \$2,600,000 now in this company, an amount which would represent their interest, being about 15 to 1 to the stockholders. The original loan has been in default for many months. In

Debtor's Exhibit H—(Continued)

fact, no repayment of any portion of the principal has ever been accomplished and only within recent months has the interest been paid and brought into current condition. He further stated that an additional \$500,000 to improve and increase remanufacturing and drying facilities and other installations necessary to put the plant on a competitive basis with other mills, is required. This will increase the lending institutions' investment to approximately \$3,000,000.00. He stated that they have advanced this company funds, far beyond the customary practices and are responsible to the Federal Reserve Bank and the F.D.I.C. for any and all loans made. He stated that if the Coastal Plywood & Timber Company desired the Bank of America and the Reconstruction Finance Corporation to continue to finance the Company in the future, as they had in the past, that the Bank and RFC's position was unequivocally requiring that the future operation of the Company be accomplished under a different set of bylaws—that is they were adamant in their statement that they would decline any future financing of any kind whatsoever, including the warehouse loan account and the accounts receivable account, unless the bylaws prepared by Mr. Shannon, reviewed and approved by the Bank and RFC, were adopted without delay nor changes. If the bylaws were adopted, and the present debts were liquidated, they would have no further interest in the operation or loans to protect, and therefore would have no objection to the company reverting to any new bylaws that they might then conclude to adopt.

Debtor's Exhibit H—(Continued)

Mr. Moynihan was asked if the Bank would consider the addition of a clause making provision for a grievance committee. He reported that such an amendment would only create further delay, which according to the September 2 letter of Mr. Marsden S. Bloise, Vice-President of the Bank of America, would preclude further financial assistance of the bank; but he suggested that it would be the prerogative of the Board and Management to provide for a grievance committee and the bank would have no objection.

Mr. Blois's letter of September 2 was read by the Secretary as follows:

September 2, 1950.

Mr. Thomas A. Simmons, President
Coastal Plywood & Timber Company,
Cloverdale, California.

Dear Mr. Simmons:

We understand that the proposed modification of your bylaws along the lines discussed with you by the Reconstruction Finance Corporation and ourselves are to be made effective at your scheduled meeting September 10, 1950.

The only purpose of this letter is to impress upon you and your stockholders the necessity of taking early affirmative action on these proposed changes. As you know, the loans of the Coastal Plywood & Timber Company are in default. The Reconstruction Finance Committee has told us very plainly that there will be no further loans granted unless certain changes with which you are familiar, and

Debtor's Exhibit H—(Continued)

which have been worked out by your counsel Mr. Shannon, are made effective. If your stockholders should fail to approve these changes at their September meeting, or postpone action on them, we must insist that no further construction or expansion be permitted.

As both Mr. Wagner and the writer explained to you at the time of our meeting, you have two alternatives; first, raise the \$1,425,000 necessary to retire the Reconstruction Finance Corporation loans, plus an amount sufficient to repay the Reconstruction Finance Corporation and the bank for funds advanced for the timber purchase; or, second, accept the conditions prescribed by the Reconstruction Finance Corporation for carrying on the present indebtedness and obtaining through the Reconstruction Finance Corporation the additional funds to complete the timber purchase and finance the proposed expansion of milling facilities.

If the proposed changes in the bylaws are not approved promptly our bank is unwilling to undertake any further interim financing as we know that the Reconstruction Finance Corporation guarantee would leave us unprotected should it be necessary to close down this operation through the failure of the stockholders to cooperate with the program which has been set up.

Sincerely yours,

/s/ MARSDEN S. BLOIS,
Vice President.

Debtor's Exhibit H—(Continued)

After further discussion, Mr. Fuchs moved the previous question. Seconded and carried by a large majority.

The ballots were marked at this time and the President appointed a balloting committee consisting of: Gertrude Widenoja, Chairman, Ruben Carlson, Frank Astell, Eric Freed. Ballots were counted and the following report given:

| | |
|----------------------------|-----|
| Required for adoption..... | 126 |
| Votes in favor..... | 136 |
| Votes against | 38 |
| <hr/> | |
| Total votes cast..... | 174 |

The question of the adoption of the proposed by-laws was carried and it was so ordered.

A vote of thanks was extended to the visitors.

The meeting was adjourned at 1:15 p.m.

/s/ H. F. TILESTON,
Secretary.

ht

cc: All stockholders.

Amended By-Laws of
Coastal Plywood & Timber Company

9/10/50

Article I.

Place of Business

The principal office in the State of Nevada for the transaction of the business of the corporation shall

Debtor's Exhibit H—(Continued)

be located at Room 1, Blitz Building, 43 Sierra Street, Reno, Nevada; the principal office in California for the transaction of the business of the corporation shall be located at Cloverdale, Sonoma County, California.

Article II.

Directors

Section 1. Powers. All corporate powers (subject to limitations prescribed in the Articles of Incorporation, these By-Laws, and by law) shall be exercised by, or under the control of, and the business and affairs of this corporation shall be controlled by, a Board of Directors, at least a majority of whom shall be stockholders.

Section 2. Number. The authorized number of directors of this corporation shall be nine (9).

Section 3. Election and Term. Three directors shall be elected at each annual meeting, by each receiving a majority of the votes cast, who shall hold office for a term of three years or until their successors are elected and qualified. A majority of the stockholders at any special meeting called for that purpose may remove any director and fill the vacancy for the unexpired term. The votes for the election of a director shall be determined by further balloting until a director is elected by a majority of the votes cast.

Section 4. Nominating Committee. Prior to any annual meeting of the stockholders, the President shall appoint a nominating committee of stock-

Debtor's Exhibit H—(Continued)

holders other than directors to prepare a list of names eligible for election as directors. The committee, at least twenty (20) days prior to the date **of such annual meeting**, shall make their written report to the President specifying the names of those selected as such candidates, which list shall accompany the notice of such meeting. Nothing herein shall be construed to prevent nominations for directors from the floor at such meeting.

Section 5. Vacancies. Subject to the right of the stockholders to fill vacancies as above provided, vacancies occurring on the Board of Directors shall be filled by appointment of the Board, such appointees to hold office until the next succeeding election by the stockholders.

Section 6. Duties. The Board of Directors shall, in addition to the duties provided herein and by law, cause an audit to be made of the books of the company by a certified public accountant not less frequently than at the end of each fiscal year ending on December 31 of each year.

Section 7. Meetings. Regular monthly meetings of the Board of Directors shall be held at the call of the President, or if he be absent or be unable or refuse to call such meeting, of the Vice-President, or of any two directors, at a time to be fixed in the call, at the principal office of the corporation in California, or at any place which shall be designated from time to time by resolution of the Board of Directors or by written consent of all members of the Board. Five (5) days' notice of such meeting shall be given in writing.

Debtor's Exhibit H—(Continued)

Special meetings of the Board for any purpose or purposes whatever shall be called at any time by the President, or if he be absent or be unable or refuse to act, by the Vice-President, or by any two directors, upon five (5) days' notice in writing given to each director. Special meetings may be held at the the principal office of the corporation in California or at any place which may be designated from time to time by resolution of the Board or by written consent of all members of the Board.

Section 8. Quorum. A majority of the authorized number of directors shall constitute a quorum.

Article III.

Officers

Section 1. Election and Qualification. The officers of this corporation shall be a President, Vice-President, Secretary, Treasurer, and General Manager, who shall be appointed by the Board of Directors. Each of said officers shall serve until he shall resign or be removed or be disqualified, or until his successor shall be elected. The President and Vice-President must be Directors; the Secretary, Treasurer and General Manager may, but need not be Directors. All of such officers must be stockholders with the exception of the General Manager, who need not be a stockholder.

Section 2. President. The President shall:

- (1) Preside at all meetings of the Board of Directors and at all meetings of the Stockholders;
- (2) Call meetings of the Board of Directors;

Debtor's Exhibit H—(Continued)

(3) Exercise such other powers and perform such other duties as may be prescribed by the Board of Directors or these By-Laws.

Section 3. Vice-President. In the absence or incapacity of the President, the Vice-President shall perform the duties of the President, and shall also perform such other duties as may be prescribed for him by the Board of Directors.

Section 4. Secretary. The Secretary shall:

(1) Keep a book of minutes at the principal office of the corporation or such other place as the Board of Directors shall order, of all meetings of the Directors and stockholders in the form and manner required by law;

(2) Keep at the principal office or at the office of the corporation's transfer agent a share register or a duplicate share register, showing the details required by law, and also all other books of the corporation excepting books of account;

(3) Keep at the principal office open to inspection by stockholders at all reasonable times, the original or a certified copy of the By-laws of the corporation as amended or otherwise altered to date;

(4) Keep the corporate seal and affix it to all papers and documents requiring a seal;

(5) Attend to the giving and serving of all notices of the corporation required by law or these By-laws to be given;

(6) Attend to such correspondence as may be assigned to him and perform all other duties inci-

Debtor's Exhibit H—(Continued)

dental to his office or prescribed by the Board of Directors or by law.

Section 5. Treasurer. The Treasurer shall:

(1) Keep and maintain open to inspection by any Director at all reasonable times, adequate and correct accounts of the properties and business transactions of the corporation, which shall include all matters required by law and be in form as required by law; and shall send each Director regular monthly balance sheet and operating statement of the company on or before the 15th day of each month covering the operations of the preceding month.

(2) Have the care and custody of the funds and valuables of the corporation and deposit the same in the name of and to the credit of the corporation with such depositaries as the Board of Directors may designate;

(3) Disburse the funds of the corporation as he may be ordered by the Board, taking proper vouchers for such disbursements; all checks of the corporation shall be signed by such person or persons and in such manner as, from time to time, shall be determined by resolution by the Board.

(4) Render to the President or to the Board of Directors, whenever they may require it, an account of all his transactions as Treasurer, and a financial statement in form satisfactory to them, showing the condition of the corporation;

(5) Have such other powers and perform such

Debtor's Exhibit H—(Continued)

other duties as may be prescribed by the Board of Directors.

Section 6. Bonds. Any officer or other person having custody of or handling the funds or property of the corporation shall furnish a bond satisfactory to the Board of Directors, the cost of such bond to be paid by the corporation.

Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation.

Article IV.

Meetings of Stockholders

Section 1. Annual. The annual meeting of the stockholders shall be held at the principal office of the corporation in California on the first Sunday of May of each year at 10 o'clock a.m., or at such other time and place as may be determined by the Board of Directors. In the event that the first Sunday in May is a legal holiday, the meeting shall be held on the next succeeding Sunday not a legal holiday.

Section 2. Special. Special meetings of the Stockholders for any purpose or purposes whatsoever may be called at any time by the President or by the Board of Directors. Special meetings may

Debtor's Exhibit H—(Continued)

also be called by stockholders holding at least 20% of the issued and outstanding stock. Upon receiving written request for such meeting from the stockholders, the Secretary shall call such meeting.

Section 3. Notice. Written notice of any meeting of stockholders shall be given to each stockholder entitled thereto not less than ten (10) days before such meeting in the manner prescribed by statute, which notice shall specify the day and hour and place of such meeting, provided that notice of special meetings shall also specify the general nature of the business to be transacted.

Section 4. Quorum. No meeting of stockholders shall transact business unless a majority of the shares entitled to vote thereat is represented, except to adjourn from day to day until such time as may be deemed proper.

Article V.

Capital Stock

Section 1. Capital stock shall be issued and transferred only as provided in the Articles of Incorporation. Transfers of certificates of stock shall be made only on the books of the corporation, and before a new certificate is issued the old certificate must be surrendered for cancellation.

Article VI.

Section 1. Power of Stockholders. New By-laws may be adopted or these By-laws may be amended or repealed by the vote of stockholders entitled to

Debtor's Exhibit H—(Continued)

exercise a majority of the voting power of the corporation, or by the written assent of such stockholders, except as otherwise provided by law or by the articles of incorporation.

Section 2. Power of Directors. Subject to the right of stockholders as provided in Section 1 of this Article VI to adopt, amend or repeal By-laws, By-laws other than the by-law or amendment thereof changing the authorized number of directors may be adopted, amended or repealed by the Board of Directors.

I, H. F. Tileston, hereby certify that I am secretary of Coastal Plywood & Timber Company, a corporation, that the foregoing is a true copy of the amended By-Laws of Coastal Plywood & Timber Company as adopted by the stockholders on the 10th day of September, 1950, at a special meeting of said stockholders; and that said Amended By-Laws have not been changed or rescinded.

/s/ H. F. TILESTON,
Secretary.

[Endorsed]: Filed February 14, 1952.

PETITIONERS' EXHIBIT No. 1

Coastal Plywood & Timber Company
 Cloverdale, California
 December 27, 1951

Planing Mill—Yard

The following men will be laid off as of close of the work day December 28, 1951: John Vick, J. W. Norberg, R. C. Zimmerman, Edwin Jasman, Milo Barnhart, N. G. Matson, George Scott, and Frank Sutton.

/s/ MARTIN T. DYKE,
 Manager.

[Endorsed]: Filed February 11, 1952.

 PETITIONERS' EXHIBIT No. 4

Certificate No. 14921

United States of America
 State of Washington
 Department [Seal] of State

To All to Whom These Presents Shall Come

I, Belle Reeves, Secretary of State of the State of Washington and custodian of the Seal of said State, do hereby certify that the annexed is a true and correct copy of the Agreement of Merger, merging the Coastal Plywood Corporation, a Washington Corporation, with and into the Coastal Plywood & Timber Company, a Nevada Corporation, the surviving corporation, as received and filed in this office on December 9, 1947.

Petitioners' Exhibit No. 4—(Continued)

Agreement of Merger

This Agreement of Merger, dated this 9th day of September, 1947, made by and between Coastal Plywood & Timber Company, a corporation organized and existing under the laws of the State of Nevada, and Coastal Plywood Corporation, a corporation organized and existing under the laws of the State of Washington;

Witnesseth:

That Whereas, said two corporations deem it advisable that Coastal Plywood Corporation be merged with and into Coastal Plywood & Timber Company, as authorized by the Statutes of the State of Washington and the State of Nevada, respectively, under and pursuant to the terms and conditions hereinafter set forth; and

Whereas, said Coastal Plywood & Timber Company has an authorized capital stock consisting of One Thousand (1,000) shares of stock, without nominal or par value, of which One Thousand (1,000) are issues and outstanding and are owned and held by individual stockholders; and

Whereas, Coastal Plywood Corporation has an authorized capital stock consisting of Two Hundred (200) shares of stock of the par value of Two Thousand Five Hundred Dollars (\$2,500.00) per share, of which 180 are issued and outstanding and are owned and held by individual stockholders, and of which 20 shares are subscribed for but not paid in full as of the date of this agreement,

Petitioners' Exhibit No. 4—(Continued)

Now, Therefore, in consideration of the premises and mutual covenants, agreements, provisions and grants herein contained, the said corporations, by and between their respective boards of directors, the parties hereto, have agreed, and do hereby agree each with the other, that Coastal Plywood Corporation be merged with and into said Coastal Plywood & Timber Company, hereafter referred to as the "surviving corporation," under the name of Coastal Plywood & Timber Company, pursuant to the laws of the State of Washington and of the State of Nevada, respectively, and do hereby agree upon and prescribe the terms and conditions of said merger and of carrying the same into effect as follows:

First: Coastal Plywood Corporation shall be, and hereby is, merged into Coastal Plywood & Timber Company, and the said two corporations are hereby merged, it being the intention of the parties that, except as hereinafter provided and set forth, said Coastal Plywood & Timber Company shall retain its corporate existence as prior to said merger and continue as the surviving corporation and, as before, be named and known as "Coastal Plywood & Timber Company" and be under and subject to the laws of the State of Nevada, and its Amended Articles of Incorporation which, for the sake of clarity and as further amended by the terms of this merger agreement, are set forth in their entirety as follows:

Petitioners' Exhibit No. 4—(Continued)

The Amended and Substituted
Articles of Incorporation
of
Coastal Plywood & Timber Company

Article I.

The name of the corporation is: Coastal Plywood & Timber Company.

Article II.

The principal office and place of business of this corporation in the State of Nevada shall be located at Suite 28, Stack Building, 153 North Virginia Street, Reno, Washoe County, but the corporation may have and maintain office or offices in such towns, cities, states, foreign countries, and places, either in or outside of the State of Nevada, as the Board of Directors may from time to time determine to be convenient or practical, and all business of this corporation, of every kind and nature, may be transacted outside of the State of Nevada, the same as within the State of Nevada.

Article III.

The nature of the business and the objects and purposes for which this corporation is formed are, among other things, to organize, promote and carry on such ventures, business and businesses in general as may be determined from time to time by the Board of Directors.

In furtherance, but not in limitation, of the general powers conferred by the laws of the State of

Petitioners' Exhibit No. 4—(Continued)

Nevada, and of the objects and purposes hereinabove stated, it is hereby provided that this corporation will also have the following powers and privileges, namely:

(a) To engage in the business of operating saw-mills, plywood plants, and other lumber manufacturing or remanufacturing plants or other wood working plants, in all parts of the world.

(b) To engage in the business of acquiring, either by lease or purchase, or otherwise, timber and timber lands, in all parts of the world; and to operate, sell, or otherwise deal in and with such properties.

(c) To manufacture, produce, purchase, or in any other lawful manner acquire, and to hold, own, mortgage, pledge, sell, transfer, or in any other lawful manner dispose of, and to deal and trade in all manner of goods, wares, equipment and merchandise and property of any and every kind, character, class and description, and in any or all parts of the world.

(d) To acquire, buy, purchase, or otherwise deal with the goodwill, rights and property, and to undertake the whole or any part of the assets or liabilities of any person, firm, association or corporation; to hold, or in any manner to dispose of, the whole or any part of any business so acquired, and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

(e) To engage in any kind of mining, mining

Petitioners' Exhibit No. 4—(Continued)

engineering, mine management, and/or manufacturing business or businesses, and to construct, buy, exchange, contract for, lease, or otherwise acquire, take, hold, own, and to sell, mortgage, lease or otherwise dispose of mining, dredging and/or manufacturing plants, and to manage, operate, maintain, improve and develop the same, together with all machines, tools, equipment, appliances, appurtenances and/or facilities necessary or convenient in connection therewith.

(f) To purchase, hold, sell, exchange, or transfer, or otherwise deal in shares of its own capital stock, bonds, or other obligations from time to time, to such extent, and in such manner, and upon such terms as its Board of Directors shall determine; provided, that this corporation shall not use any of its funds or property for the purchase of its own shares of capital stock when such would cause any impairment of the capital of this corporation; and provided, further, that shares of its own capital stock belonging to this corporation shall not be voted, either directly or indirectly, nor counted as outstanding for the purpose of any stockholders' quorum or vote.

(g) To guarantee, purchase, or otherwise acquire, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, the shares of the capital stock of, or any bonds, securities, or evidences of indebtedness created by any other corporation or corporations of this state, or any other state, country, nation or government; and, while owner of

Petitioners' Exhibit No. 4—(Continued)

said stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon to the same extent as natural persons might or could do.

(h) To loan money and to enter into, make and perform contracts of every kind, with any person, firm, association or corporation, municipality, political body, county, territory, state, government or colony or dependency thereof, and without limit as to amount; to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable or transferable instruments, and evidences of indebtedness, whether secured by mortgage or otherwise, as well as to secure the same by mortgage or otherwise, so far as may be permitted by the laws of the State of Nevada.

(i) To act as agent or factor for any person, firm or corporation; to conduct a general brokerage agency or commission business in the purchase, sale and/or management of real estate, or exploit for others, upon commission or otherwise, personal property, both tangible and intangible, including stocks, bonds, notes, patents, patent rights and licenses, and to negotiate loans thereon for others.

(j) To sell and issue shares of its capital stock, in such amounts, at such times, for such lawful considerations, and upon such terms, as the Board of Directors shall from time to time determine, subject to the limitations hereinafter set forth upon the sale and issuance of Class "A" common stock.

Petitioners' Exhibit No. 4—(Continued)

(k) To have offices, conduct its business, and promote its objects, within and without the State of Nevada, in other states, the District of Columbia, the territories and colonies of the United States, and in foreign countries, without restriction as to place or amounts.

(l) To carry on any other lawful business of any kind whatsoever which may seem to the corporation capable of being carried on in connection with the foregoing, or calculated, directly or indirectly, to promote the interests of the corporation, or to enhance the value of the properties, or to increase the volume or profits of its business or businesses; and to have, enjoy and exercise all the rights, powers and privileges which are now, or which may hereafter be, conferred upon corporations organized under the same statutes as this corporation, or which may be hereafter conferred by law.

(m) To do any and all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world, as, and/or through principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

In general, to carry on any other business in connection therewith, whether manufacturing or otherwise, not forbidden by the laws of the State of Nevada, and with all the powers conferred upon corporations by the laws of the State of Nevada.

Petitioners' Exhibit No. 4—(Continued)

Article IV.

The total number of shares of capital stock that may be issued by this corporation is eight hundred (800) shares of common stock divided into two classes:

(a) Four hundred (400) shares of Class "A" stock of the par value of Twenty-five Hundred Dollars (\$2,500.00) each;

(b) Four hundred (400) shares of Class "B" stock without nominal or par value.

The Class "B" stock shall be distinguished from Class "A" stock in that it shall have voting privileges in the election of Directors, only as set forth in the succeeding Article V.

The Class "A" stock shall be entitled to receive one-half of all dividends declared and to receive one-half of any lawful distribution to stockholders of assets of the corporation, whether such distribution be partial or complete and whether on final liquidation or otherwise and whether voluntary or involuntary.

The Class "B" stock shall be entitled to receive one-half of all dividends declared and to receive one-half of any lawful distribution to stockholders of assets of the corporation, whether such distribution be partial or complete and whether on final liquidation or otherwise and whether voluntary or involuntary. Any such dividends or distribution of assets, shall first be allocated equally, that is, one-half to Class "A" stock and one-half

Petitioners' Exhibit No. 4—(Continued)
to Class "B" stock, and the share of each class shall then be apportioned equally among the stockholders, entitled to participate, of each class of stock.

Class "A" stock shall be issued, sold and transferred, whether by operation of law or otherwise, only in accordance with Article IX below.

The capital stock, after the amount of the subscription price, or par value, has been paid in, shall not be subject to assessment to pay the debts of the corporation.

Subscriptions for Class "A" stock may be accepted, subject to the provisions of Article IX herein, upon such terms and conditions as a majority of those directors elected by or representing Class "A" stockholders, may determine from time to time. No subscriber shall be entitled to a certificate of stock, until the subscription price is paid in full according to its terms, but so long as he is not in default in any of the terms of his subscription agreement, he shall be entitled to vote as a Class "A" stockholder, and shall be credited with any dividends declared on Class "A" stock, upon the purchase price of the stock.

Article V.

The number of Directors of this corporation is and shall be twelve (12). The holders of Class "A" stock shall be entitled to elect nine (9) of such Board of Directors and the holders of Class "B" stock shall be entitled to elect three (3) Directors. The terms in office and qualifications

Petitioners' Exhibit No. 4—(Continued)
of all Directors shall be determined and set forth
in the Bylaws.

The number of Directors shall not be decreased
or increased.

The names and post office addresses of the pres-
ent Board of Directors who are to serve until the
election and qualification of their successors are
as follows:

Representing Class "A" stockholders:

Carl E. Anderson—P. O. Box 31, Cloverdale,
California.

W. L. Brauning—P. O. Box 31, Cloverdale,
California.

Ruben Carlson—P. O. Box 31, Cloverdale, Cali-
fornia.

F. A. Johnson—P. O. Box 31, Cloverdale,
California.

Gunnar Lindbeck—P. O. Box 31, Cloverdale,
California.

Keith Meyn—P. O. Box 31, Cloverdale, Cali-
fornia.

Lyall T. Neat—P. O. Box 31, Cloverdale, Cali-
fornia.

L. J. Parks—304 Tuckor St., Healdsburg, Cali-
fornia.

C. Frank Tileston, Jr.—P. O. Box 31, Clover-
dale, California.

Petitioners' Exhibit No. 4—(Continued)

Representing Class "B" stockholders:

Walter M. Gleason—Merchants' Exchange Bldg., San Francisco, California.

Harry B. Murphy—P. O. Box 2127, Boise, Idaho.

George E. Murphy—302 Lumbermen's Bldg., Portland, Oregon.

In the event of a vacancy in the Directors elected by the holders of Class "A" stock, such vacancy shall be filled by appointment by the remainder of those Directors, and in the event of a vacancy in the Board of Directors elected by the holders of Class "B" stock such vacancy shall be filled by appointment by the remainder of those Directors. In the event that such appointments cannot be made for any reason the holders of the appropriate class or classes of stock shall elect the necessary Director or Directors at a special meeting duly called for that purpose, in accordance with the provisions of the Bylaws.

Article VI.

The Board of Directors shall have full and complete power to conduct, operate and manage the business and affairs of the corporation, subject only to such restrictions as shall be contained in these Articles or in the Bylaws of this corporation, or law. The following acts, deeds or things shall not be done, however, without the

Petitioners' Exhibit No. 4—(Continued)

consent and approval of the majority of the holders of the Class "B" stock duly expressed at a meeting called for such purpose in accordance with the Bylaws.

(1) The Corporation will not place any mortgage or other lien upon any of its property or assets; provided, however, that this shall not be construed as preventing purchase money mortgages or prior existing mortgages upon timberlands or other property acquired by the Corporation after its incorporation, if such mortgage is restricted to the property so acquired.

(2) The Corporation will not incur any indebtedness (except such as may represent indebtedness secured by purchase money mortgages or prior existing mortgages on after acquired property) maturing later than one (1) year from the date thereof, nor any indebtedness, except such as is incurred in the usual course of the Corporation's business.

(3) The Corporation will not authorize the issuance of any preferred or other stock having preferences or priorities over the Class "A" and "B" Common Stock.

(4) The Corporation will not make any loans to any of its stockholders, directors, officers or employees.

(5) The Corporation will not sell or convey all

Petitioners' Exhibit No. 4—(Continued)

or a substantial portion of its assets or consolidate or merge with any other corporation.

(6) The Corporation will not guarantee, nor will it permit any subsidiary corporation to guarantee, any obligations of any other corporation.

Article VII.

The stockholders and directors shall have power to hold their meetings, and to keep their books and records, outside of the State of Nevada, and at such place or places as may from time to time be designated by the Bylaws or by the Board of Directors, except as otherwise required by the laws of the State of Nevada.

Article VIII.

This Corporation is to have a perpetual existence.

Article IX.

In view of the particular nature of this Corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with Class "A" stock ownership, no shares of Class "A" stock may be issued except as follows:

One share of such stock only can be issued to or owned by any stockholder, and such stockholder must be an active employee, or a person acceptable to the Board of Directors as a future active employee of the Corporation.

Petitioners' Exhibit No. 4—(Continued)

It is further provided that:

(a) No owner of Class "A" stock may sell, transfer or assign his share until and unless he first gives to the Corporation's President or Secretary written notice of his intention to sell, transfer or assign, setting forth in such notice the number of the certificate therefor and the name and residence of the person who is the holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors shall, for a period of 60 days after receipt of such written notice, have the sole and exclusive option of purchasing said share at the bona fide market value, as hereinafter defined. Payment for such share may be made by the Board of Directors by depositing said bona fide market value to the credit of such shareholder in any National Bank in Cloverdale, California, or San Francisco, California, to be paid to such shareholder by said bank upon the surrender of the certificate for said share of Class "A" stock properly endorsed; the Board shall give written notice of such deposit to the shareholder (by registered mail addressed to the person and address given in the stockholder's notice).

(b) Any person acquiring through will, descent, or by conveyance to take effect at death, or sale in the administration of any estate, any share of Class "A" stock of the Corporation shall be bound to give written notice of such acquisition to the Presi-

Petitioners' Exhibit No. 4—(Continued)

dent or Secretary of the Corporation, setting forth in such notice the number of the certificate, the name of the registered holder, and the name and residence address of the person acquiring such share, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors, for a period of 60 days after receipt of such notice, shall have an exclusive option of purchasing such share at the bona fide market value, as hereinafter defined. The person so acquiring said share shall be notified of the exercise of said option and paid therefor in the manner prescribed in subparagraph (a).

(c) The purchaser of any share of Class "A" stock sold on execution or any other sale by operation of, or under authority of, law and the pledgee of any share of Class "A" stock before bringing any suit, action, or proceeding or doing any act to foreclose his pledge shall first deliver to the President or Secretary of the Corporation written notice of such purchase or intention to foreclose, designating the number of the certificate and the name and residence address of the pledgee or the present holder thereof, and the name of an appraiser, in the event appraisal, as hereinafter provided, is required. On behalf of the Corporation the Board of Directors shall have the sole and exclusive option, for a period of 60 days after receipt of such notice, to purchase said shares at the bona fide market value, as hereinafter defined. Notice of the exercise

Petitioners' Exhibit No. 4—(Continued)

of said option and payment to be accomplished in the manner hereinabove prescribed in subparagraph (a).

(d) On behalf of the Corporation the Board of Directors shall have the sole and exclusive option to purchase from any holder of Class "A" stock who shall fail to report for work within sixty (60) days after the mailing to him, by registered mail, of written call to report for work, or who shall voluntarily or involuntarily cease to be employed by the Corporation by reason of discharge, retirement, resignation, disability or any other reason whatsoever, the share of stock of such holder at the bona fide market value, as hereinafter defined, for a period of 60 days from such failure to report or such cessation of employment. Notice of the exercise of said option and payment to be accomplished in the manner prescribed in subparagraph (a).

The specific provisions governing discharge, retirement, or disability shall be set forth in the Bylaws.

(e) Shares of Class "A" stock shall give to the holder thereof no power to vote thereon and no right to dividends declared thereon subsequent to notification by the Corporation of its exercise of option to purchase under the terms and conditions defined in subparagraphs (a), (b), (c) and (d) above. Upon a stockholder's refusal to surrender his certificate, the Corporation, after making proper deposit of payment, may cancel such certificate.

(f) Shares of Class "A" stock acquired by the Corporation under the provisions of subparagraphs

Petitioners' Exhibit No. 4—(Continued)

(a), (b), (c) and (d) above may be resold only to persons who are or agree to become employees of the Corporation who own no Class "A" stock, limiting such resales to one share of Class "A" stock per employee.

(g) Bona fide market value is defined as follows:

(1) The Board of Directors and the person desiring to sell or foreclose may agree upon the bona fide market value at which the Corporation shall repurchase the stock.

(2) In the event said bona fide market value is not agreed upon it shall be determined by an appraisal made by a majority of three appraisers who shall be selected, one by any owner, holder or pledgee referred to in (a), (b), (c) and (d) above, one by the Board of Directors, and one by the two appraisers thus selected. If the two appraisers so selected shall not, within 20 days of their selection, agree upon the third appraiser, either party may apply, upon 5 days' written notice to the other, to any judge of any court of general jurisdiction in Sonoma or Mendocino county, California for the appointment of such third appraiser. The three appraisers so selected shall, within 20 days after the third appraiser is selected, appraise such shares and give written notice thereof to both parties, any expenses of appraisal to be paid one-half by each party. The Corporation's 60 day option to purchase, as set forth in (a), (b), (c) and (d) above, shall be extended by the time

Petitioners' Exhibit No. 4—(Continued)

required for selection of appraisers and appraisal.

(3) Bona fide market value shall be determined as of the date the Corporation receives the written notice referred to in subparagraphs (a), (b) and (c) above, or sends the written notice provided for in subparagraph (d) above.

(h) If the Corporation fails to exercise or waives its option to purchase said stock as provided for in this Article IX, said stock may be sold or transferred at any price agreed upon between the holder and the transferee, provided only, that such transferee is an active employee holding no Class "A" stock or is a person acceptable to the Board of Directors as a future active employee of the Corporation.

Article X.

These Articles may be amended only by majority vote of the holders of each class of stock, voting separately.

Second: The principal office of the surviving corporation in the State of Nevada is located at Suite 28, Stack Building, 153 North Virginia Street, Reno, County of Washoe, Nevada. The name and address of its resident agent is T. L. Withers, Withers & Edwards, Stack Building, 153 North Virginia Street, Reno, Nevada.

Third: The amount of capital with which the surviving corporation will continue business after said merger becomes effective will be \$450,000.00, or more.

Petitioners' Exhibit No. 4—(Continued)

Fourth: The surviving corporation shall possess all the rights, privileges, powers and franchises as well of a public as of a private nature, and be subject to all the restrictions, disabilities and duties of such merging corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the surviving corporation, and all property, rights and privileges, powers and franchises, and all and every other interest, shall be thereafter as effectually the property of the surviving corporation as they were of the several and respective constituent corporations, and the title to any real or personal property, whether by deed or otherwise, under the laws of the States of Nevada and Washington vested in any of said constituent corporations, shall not revert or be in any way impaired by reason of this merger; provided that all rights of creditors and all liens upon the property of any of said constituent corporations shall be preserved unimpaired, limited in lien to the property affected by such liens immediately prior to the time of this merger, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving corporation, and may be enforced against it

Petitioners' Exhibit No. 4—(Continued)

to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

Fifth: The private property of the stockholders of the surviving corporation shall not be subject to the payment of corporate debts to any extent whatsoever.

Sixth: The bylaws of the surviving corporation shall be the amended bylaws of the Coastal Plywood & Timber Company as set forth in Exhibit "A" attached hereto, and by reference incorporated herein.

Seventh: The manner of converting the shares of each of the constituent corporations into shares of the surviving corporation shall be as follows:

The holders of shares of the non-par stock of Coastal Plywood & Timber Company shall surrender the certificate therefor to the surviving corporation for cancellation, and shall receive for every two and one-half (2½) shares of such non-par stock so surrendered, and all accumulated dividends accrued and to accrue thereon, and any and all rights evidenced thereby, one share of non-par Class "B" common stock of the surviving corporation.

The holders of shares and the subscribers for shares of the stock of Coastal Plywood Corporation, of the par value of Two Thousand Five Hundred Dollars (\$2,500.00) per share, shall surrender the certificates therefor, or have their stock subscriptions therefor automatically transferred, to the surviving corporation for cancellation, and shall

Petitioners' Exhibit No. 4—(Continued)

receive for every share of such par value stock so surrendered, and for every subscription therefor so transferred when paid, and all accumulated dividends accrued and to accrue thereon, and any and all rights evidenced thereby, one (1) share, or subscription to one (1) share, as the case may be, of Class "A" common stock of the par value of two thousand five hundred dollars (\$2,500) per share of the surviving corporation.

Any and all unissued shares of Coastal Plywood Corporation shall not be eligible for exchange for stock of the surviving corporation, and all such unissued stock shall cease to exist immediately upon the effective date of this merger. Nothing herein contained, however, shall prevent the automatic transfer of stock subscriptions, as provided for in paragraph Fourth of this agreement, and all such stock subscriptions for shares in said Coastal Plywood Corporation shall henceforth be considered subscriptions for shares in the surviving corporation, as provided for above in this paragraph Seventh.

In connection with the consummation of this merger, there shall be no dedication of additional capital by the surviving corporation, either by transfer of earned surplus or otherwise. Any surplus appearing on the books of the constituent corporations, whatever the nature or origin of the same may be, shall be entered as surplus on the books of the surviving corporation, and any such surplus so entered on the books of the surviving

Petitioners' Exhibit No. 4—(Continued)

corporation shall be of the same character as it was on the books of the constituent corporations.

No holder of stock of the surviving corporation shall have any preemptive or preferential right of subscription to any shares of any class of stock of the surviving corporation which remain unissued after completion of the exchange provided for in this paragraph Seventh, or which may hereafter be created by way of increase of the surviving corporation's stock; the right to subscribe to any such unissued stock of any class of stock of the surviving corporation is to be governed by the terms of the Amended Articles of Incorporation of Coastal Plywood & Timber Company, hereinabove set forth.

From and after the effective date of this merger, the holders of the outstanding issued stock of both of the constituent corporations and the subscribers for any of the authorized but unissued stock of Coastal Plywood Corporation shall have no rights with respect thereto, except such rights as are expressly provided in this paragraph Seventh, or expressly accorded by the laws of the States of Nevada and Washington, respectively, applicable to this merger, and all such stock, and the issues of which they are a part, shall be cancelled and cease to exist upon surrender in accordance with the provisions of this paragraph Seventh, or the said laws of the State of Nevada and the State of Washington, and all such subscriptions for stock in Coastal Plywood Corporation shall, as hereinabove provided in paragraph Fourth of this agree-

Petitioners' Exhibit No. 4—(Continued)

ment be automatically transferred to and vested in the surviving corporation, and thereafter be enforceable only as subscriptions for stock in the surviving corporation, as hereinabove provided in this paragraph Seventh, and as provided in the laws of the States of Nevada and Washington.

As a condition precedent to the receipt of a share, or a subscription to a share, or Class "A" common stock, as herein provided, the holder (to wit, the person eligible to exchange his stock) or subscriber, as the case may be, shall first sign a contract of employment, in a form to be approved by the members of the Board of Directors elected by Class "A" stockholders, which shall contain, among other provisions, the terms of Article IX of the Amended and Substituted Articles of Incorporation, hereinabove set forth.

Eighth: The surviving corporation may, at any time, alter or amend any of the provisions of this agreement, to the extent permitted by law, by amendment of its Articles of Incorporation.

Ninth: This Agreement of Merger shall not become effective unless approved by a vote of sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of the outstanding and issued stock of Coastal Plywood & Timber Company, voting separately, and unless approved by sixty-six and two-thirds per cent ($66\frac{2}{3}\%$) of the authorized stock of Coastal Plywood Corporation, which is issued and outstanding voting separately, at meetings of the stockholders thereof called in accordance with the laws of the

Petitioners' Exhibit No. 4—(Continued)

State of Nevada and the State of Washington, respectively, for the purpose of approving or disapproving the terms of this agreement. All acts and things required to be done to effect the approval of this Agreement of Merger shall be attended to and done by the proper officers of the constituent corporations within such time and in such manner that the merger provided for herein will become effective on or before November 1, 1947.

In Witness Whereof the undersigned directors, being a majority or more of the Boards of Directors of each of the said constituent corporations, and having voted in favor of entering into the foregoing Agreement of Merger at director's meetings of the respective constituent corporations, duly called and regularly held for that purpose, have hereunto signed their names, and caused the corporate seals of the respective constituent corporations to be hereto affixed on the day and year first above written.

(Corporate Seal)

COASTAL PLYWOOD &
TIMBER COMPANY.

Directors:

WALTER M. GLEASON,
HARRY B. MURPHY,
GEORGE E. MURPHY,
C. FRANK TILESTON, JR.,

Petitioners' Exhibit No. 4—(Continued)

F. A. JOHNSON,
LYALL T. NEAT,
W. L. BRAUNING,
CARL E. ANDERSON,
KEITH W. MEYN,
RUBEN CARLSON,
GUNNAR LINDBECK,
L. J. PARKS.

I, George E. Murphy, Secretary of Coastal Ply-wood & Timber Company, hereby certify that the foregoing Agreement of Merger, after having been duly signed by a majority or more of the directors of each of the constituent corporations, was duly submitted to the stockholders of Coastal Plywood & Timber Company at a special meeting thereof, called separately by the Board of Directors for the purpose of considering and taking action upon said Agreement of Merger, and regularly held on the 20th day of September, 1947, and the holders of one hundred per cent (100%) of the issued and outstanding stock of said corporation being duly represented thereat and having filed with the Secretary written waiver of notice of the time, place and purpose thereof, in accordance with the by-laws and laws of the State of Nevada, a vote was taken by ballot for the adoption or rejection of said Agreement of Merger, and one hundred per

Petitioners' Exhibit No. 4—(Continued)

cent (100%) of the issued and outstanding stock of said corporation was voted in favor of the adoption of said Agreement of Merger.

In Witness Whereof, I have hereunto set my hand as Secretary and affixed the corporate seal of Coastal Plywood & Timber Company this 22nd day of October, 1947.

(Corporate Seal)

GEORGE E. MURPHY,
Secretary of Coastal Plywood
& Timber Company.

I, F. A. Johnson, Secretary of Coastal Plywood Corporation, hereby certify that the foregoing Agreement of Merger, after having been first duly signed by a majority or more of the directors of each of the constituent corporations, was duly submitted to the stockholders of Coastal Plywood Corporation at a special meeting thereof, called separately by the Board of Directors for the purpose of considering and taking action upon said Agreement of Merger, and regularly held on the 21st day of September, 1947, and the holders of eighty-five per cent (85%) of the issued and outstanding stock of said corporation, being duly represented thereat, and having received proper written notice of the time, place and purpose thereof, in accordance with the bylaws and the laws of the State of Washington, a vote was taken by ballot for the adoption or rejection of said Agreement of Merger, and seventy-eight and one-half

Petitioners' Exhibit No. 4—(Continued)

per cent (78.5%) of the issued and outstanding stock of the said corporation was voted in favor of the adoption of said Agreement of Merger.

In Witness Whereof, I have hereunto set my hand as Secretary and affixed the corporate seal of Coastal Plywood Corporation this 23rd day of October, 1947.

(Corporate Seal)

F. A. JOHNSON,
Secretary of Coastal Plywood
Corporation.

The foregoing Agreement of Merger, having been executed by a majority or more of the directors of Coastal Plywood & Timber Company, a Nevada corporation, and Coastal Plywood Corporation, a Washington corporation, the corporate parties thereto, and having been submitted to the stockholders of both said Coastal Plywood & Timber Company and said Coastal Plywood Corporation, at special meetings thereof separately called and held in accordance with the statutes of the State of Nevada and the State of Washington, respectively, and having been adopted by votes cast by ballot of the stockholders of each of said corporate parties thereto, representing more than two-thirds of the total number of shares of each of the classes of outstanding capital stock of each of said corporate parties, all in accordance with the statutes of the State of Nevada and the State of Washington, respectively, and that fact having been cer-

Petitioners' Exhibit No. 4—(Continued)
tified on said Agreement of Merger by the Secretary of each of said corporate parties, the President and Secretary of each said corporate party do now hereby execute the said Agreement of Merger under the corporate seals of their respective corporations, by authority of the directors and stockholders thereof, as the respective act, deed and agreement of each of said corporations, on this 22nd day of October, 1947.

COASTAL PLYWOOD &
TIMBER COMPANY,

By HARRY B. MURPHY,
Its President,

By GEORGE E. MURPHY,
Its Secretary.

Attest:

GEORGE E. MURPHY,
Secretary.

(Corporate Seal)

COASTAL PLYWOOD
CORPORATION,

By C. FRANK TILESTON, JR.,
Its President,

By F. A. JOHNSON,
Its Secretary.

Attest:

F. A. JOHNSON,
Secretary.

(Corporate Seal)

Petitioners' Exhibit No. 4—(Continued)

State of California,

City and County of San Francisco—ss.

This Is to Certify that on this 22nd day of October, 1947, before me, the undersigned, a Notary Public in and for the State of California, duly commissioned and sworn, personally appeared Harry B. Murphy, to me known to be the President of Coastal Plywood & Timber Company, one of the corporations that executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of the corporation.

Witness my hand and official seal, the day and year in this certificate first above written.

JAMES F. McCUE,

Notary Public in and for the State of California,
residing at San Francisco.

State of California,

County of Sonoma—ss.

This Is to Certify that on this 23rd day of October, 1947, before me, the undersigned, a Notary Public in and for the State of California, duly commissioned and sworn, personally appeared C. Frank Tileston, Jr., to me known to be the President of Coastal Plywood Corporation, one of the corporations that executed the foregoing instru-

Petitioners' Exhibit No. 4—(Continued)

ment, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal, the day and year in this certificate first above written.

J. L. MILLER, JR.,

Notary Public in and for the State of California,
residing at Cloverdale.

My commission expires August 28, 1951.

EXHIBIT "A"

Amended Bylaws of
Coastal Plywood & Timber Company

Article I.

Place of Business

The principal office for the transaction of the business of the corporation shall be located at Suite 28, Stack Building, 153 North Virginia Street, Reno, Nevada.

Article II.

Directors

Section 1. The authorized number of Directors of this corporation shall be twelve (12), elected in the manner provided in the Articles of Incorporation.

Petitioners' Exhibit No. 4—(Continued)

Section 2. Election:

(a) Directors shall be elected at the annual meeting of the stockholders, as above provided, by a majority vote of the shares of each class of stock entitled to vote, who shall hold office as provided hereinafter and until their successors are elected. A majority of such stockholders at any special meeting duly called may remove any Director, elected by such stockholders, for cause, and fill the vacancy.

Section 3. Qualifications and terms of office:

(a) Directors elected by holders of Class "A" stock.

Such Directors shall be stockholders holding Class "A" stock, and at the first annual meeting of the stockholders held hereafter the three receiving the highest number of votes shall serve for a term of three years; the next three highest shall serve for two years; and the next three highest shall serve for one year. In the event of a tie vote, the position or positions shall be decided by drawing lots.

Thereafter three Directors shall be elected each year for a three-year term of office. Vacancies shall be filled in the manner provided in the Articles of Incorporation, i.e. such vacancy shall be filled by appointment by the remainder of those Directors. In the event that such appointment cannot be made for any reason, the Class "A" stockholders shall elect the necessary Director or Directors at a special meeting, duly called for that purpose.

Petitioners' Exhibit No. 4—(Continued)

Prior to any annual meeting of the stockholders, the President shall appoint a nominating committee of three Class "A" stockholders other than Directors to prepare a list of names eligible as Directors, to be voted on by the Class "A" stockholders at their meeting. Nothing herein shall be construed to prevent nominations for Directors from the floor at such meeting. The committee, at least twenty (20) days prior to the date of such annual meeting, shall make their written report to the President, and the list of proposed names shall be submitted to the Class "A" stockholders for their information, with the notice of such meeting.

(b) Directors elected by holders of Class "B" stock.

Such Directors shall be stockholders holding Class "B" stock, and at the first annual meeting of the stockholders held hereafter shall be elected for concurrent terms of one (1) year each. Vacancies shall be filled in the manner provided in the Articles of Incorporation, i.e. such vacancy shall be filled by appointment by the remainder of those Directors.

Section 4. Powers:

All corporate powers (subject to limitations of the Articles of Incorporation and to the provisions of law requiring action to be authorized or approved by the stockholders) shall be exercised by, or under authority of, and the business and affairs of this corporation shall be controlled by, its Board

Petitioners' Exhibit No. 4—(Continued)
of Directors, and, subject to the same limitations,
the Board shall also have power:

(a) To appoint by resolution an executive committee composed of three or more members of the Board of Directors selected by such Board, the power of which committee shall be limited to supervising the day to day operations of the respective departments of the business.

Section 5. Duties:

The Board of Directors shall, in addition to the duties provided herein and by law, cause an audit to be made of the books of the Company by a certified public accountant not less frequently than at the end of each fiscal year, ending on December 31st of each year.

The Board of Directors shall, at the end of each calendar year, declare as dividends to stockholders all earnings of the corporation in excess of such reserves for working capital, contract payments, amortization of loans and other reserves which may have been authorized and set up by the Board of Directors with the separate vote of approval of the majority of the directors elected by the Class "B" stockholders.

Promptly after the receipt of the monthly statements, the Board of Directors shall examine the financial condition of the business, and if the Company, as a whole, is showing a loss and if sufficient steps cannot be taken to eliminate such loss, the Board of Directors shall temporarily suspend the operations of the Company, unless the continuance

Petitioners' Exhibit No. 4—(Continued)

of operations at a loss in any or all departments is authorized in writing by the Board of Directors, with the separate vote of approval of the majority of the Directors elected by the Class "B" stockholders.

Section 6. Meetings:

Monthly meetings of the Board of Directors shall be held at the call of the President, or if he be absent or be unable or refuse to call such meeting, by the Vice-President or by any two Directors at a time to be fixed in the call, at the principal office of the corporation, or at any place which shall be designated from time to time by resolution of the Board or by written consent of all members of the Board. Ten days' notice of such meeting shall be given in writing.

Special meetings of the Board, for any purpose or purposes whatever shall be called at any time by the President, or if he be absent or be unable or refuse to act, by the Vice-President or by any two Directors, upon five days' notice in writing or by telegram given to each Director. Such meeting may be held at the principal office of the corporation or at any place which shall be designated from time to time by resolution of the Board or by written consent of all members of the Board.

Section 7. Quorum:

Subject to the limitations herein prescribed where action is to be taken by Directors elected by holders of each of the classes of stock, a majority of the authorized number of Directors shall constitute a quorum.

Petitioners' Exhibit No. 4—(Continued)

Article III.

Officers

Section 1. Election:

The officers of this corporation shall be President, Vice-President, Secretary and Treasurer, who shall be chosen by the Board of Directors, and a General Manager chosen as hereinafter prescribed. Each of said Officers shall serve until he shall resign, or be removed, or become disqualified, or until his successor shall be elected. The President and Vice-President must be Directors, and the Secretary and Treasurer may, but need not necessarily be a Director. All of such officers however, must be Class "A" stockholders.

Section 2. President:

The President shall:

- (1) Preside at all meetings of the Board of Directors and at all meetings of the stockholders;
- (2) Call meetings of the Board of Directors;
- (3) Exercise such other powers and perform such other duties as may be prescribed by the Board of Directors or these Bylaws.

Section 3. Vice-President:

In the absence or incapacity of the President, the Vice-President shall perform the duties of the President, and shall also perform such other duties as may be prescribed for him by the Board of Directors.

Section 4. Secretary:

The Secretary shall:

- (1) Keep a book of minutes at the principal

Petitioners' Exhibit No. 4—(Continued)

office of the corporation or such other place as the Board of Directors shall order, of all meetings of the Directors and stockholders in the form and manner required by law;

(2) Keep at the principal office or at the office of the corporation's transfer agent a share register or a duplicate share register, showing the details required by law, and also all other books of the corporation excepting books of account;

(3) Keep at the principal office open to inspection by stockholders at all reasonable times, the original or a certified copy of the Bylaws of the corporation as amended or otherwise altered to date;

(4) Keep the corporate seal and affix it to all papers and documents requiring a seal;

(5) Attend to the giving and serving of all notices of the corporation required by law or these Bylaws to be given;

(6) Attend to such correspondence as may be assigned to him and perform all other duties incidental to his office or prescribed by the Board of Directors or by law.

Section 5. Treasurer:

The Treasurer shall:

(1) Keep and maintain open to inspection by any Director at all reasonable times, adequate and correct accounts of the properties and business transactions of the corporation, which shall include all matters required by law and be in form as required by law; and shall send each director

Petitioners' Exhibit No. 4—(Continued)

regular monthly balance sheet and operating statement of the Company on or before the 15th day of each month covering the operations of the preceding month.

(2) Have the care and custody of the funds and valuables of the corporation and deposit the same in the name of and to the credit of the corporation with such depositaries as the Board of Directors may designate;

(3) Disburse the funds of the corporation as he may be ordered by the Board, taking proper vouchers for such disbursements; all checks of the corporation shall be signed by any two of the President, Vice-President or Treasurer;

(4) Render to the President or to the Board of Directors, whenever they may require it, an account of all his transactions as Treasurer, and a financial statement in form satisfactory to them, showing the condition of the corporation;

(5) Have such other powers and perform such other duties as may be prescribed by the Board of Directors.

Section 6. Bonds:

Any officer or other person having custody of or handling the funds or property of the corporation shall furnish a bond satisfactory to the Board of Directors, the cost of such bond to be paid by the corporation.

Section 7. General Manager:

A General Manager shall be appointed by the

Petitioners' Exhibit No. 4—(Continued)

Board of Directors but he shall not be selected or removed or his compensation fixed except by concurrence of a majority of those members of the Board of Directors elected by the Class "B" stockholders. The General Manager shall not be a stockholder of either Class "A" or Class "B" stock. Subject to the control of the Board of Directors or Executive Committee, he shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as herein provided, his other powers, he may:

(1) Select and fix, with the approval of the Board of Directors, the compensation of a superintendent for each operating unit of the corporation; such superintendent to be neither a Class "A" nor a Class "B" stockholder. Such superintendent shall not be removed without the consent of the General Manager.

(2) Employ, suspend and discharge, subject to the approval of the Board of Directors, such non-stockholder agents and employees as the business of the corporation shall from time to time require, and prescribe their terms of employment and compensation, and also prescribe the duties of all employees, stockholders and non-stockholders. Compensation of employed Class "A" stockholders shall be governed by Article IV. Suspension and discharge of employed Class "A" stockholders shall be governed by Article V.

(3) Women shall not be employed in production or handling of manufactured materials.

Petitioners' Exhibit No. 4—(Continued)

Article IV.

Wages

Section 1. An employed stockholder holding Class "A" common stock shall be entitled before the payment of dividends on Class "A" common stock and Class "B" common stock to withdraw and be paid his wages, not in excess of the following sums:

(a) Every employed Class "A" stockholder, regardless of whether he begins his employment before or after the sawmill shall have attained production, shall work for a "beginning period" at the rate of One and 51/100 Dollars (\$1.51) per hour. The length of the "beginning period" shall be at least nine (9) months, or the number of months from September 15, 1946, until the sawmill shall have attained production, if that be more than nine (9) months;

(b) After the expiration of the "beginning period," an employed Class "A" stockholder may be paid not in excess of Two and 23/100 Dollars (\$2.23) per hour, such increases over the average going wage of the industry being considered an incentive wage predicated on the recognition that the gross average output per man of employees of Class "A" stockholders' group will exceed the average per man output of the industry; provided, however, that if the average straight time hourly rate of pay in these respective non-cooperative industries in Washington and Oregon falls below or rises

Petitioners' Exhibit No. 4—(Continued)

above the average straight time hourly rate of One and 51/100 Dollars (\$1.51) per hour now prevailing, the hourly rate then payable, both during the beginning period and thereafter, shall be reduced or increased in the same amount, penny for penny, it being understood that no adjustment in said hourly rate shall be made except in the event of a full 2½¢ per hour change upward or downward, in the average straight time hourly rate.

Section 2. Vacations:

(a) Each employee, after one year of continuous employment, shall be entitled each year to one (1) week's vacation with pay (based on the 40 hour week at the employee's straight time hourly rate in effect on the pay day immediately preceding the date fixed as the start of the vacation), or, at the discretion of the Board of Directors, a possible two (2) weeks' vacation with pay. The Board of Directors may grant longer vacations than two (2) weeks, upon such terms and conditions as may seem advisable to it upon concurrence of a majority of the directors elected by the Class "B" stock voting separately.

(b) To be eligible for a vacation with pay the employee must have been in the continuous employment of the Company for one year prior to June 1st of the year during which the vacation takes place and must be on the payroll at the time his vacation commences.

(c) "Continuous employment" for purposes of

Petitioners' Exhibit No. 4—(Continued)

vacation is defined as employment uninterrupted by:

(1) Abence due to discharge.

(2) Leave of absence granted by the Company in excess of thirteen (13) weeks.

(3) Involuntary layoffs totalling in excess of thirteen (13) weeks due to shutdowns for causes over which the Company has no control. Working on any one day of the calendar week shall be counted as "continuous employment" during that week.

However, time lost as a result of an accident, as recognized by California workmen's compensation laws, rules, and regulations, suffered during the course of employment, and the vacation period shall be considered as time worked.

(d) Time for taking vacations shall be determined by the General Manager, whose determination shall be final.

(e) Any other details concerning vacations shall be determined by resolution of the Board of Directors.

Article V.

Employee Relations

Section 1. Suspension:

The General Manager may for cause suspend any employee without pay, for a period of not more than fifteen (15) days, and with the approval of a majority of the Board of Directors elected by the Class "A" stockholders, may for cause

Petitioners' Exhibit No. 4—(Continued)

suspend any employee without pay for a period of not more than thirty (30) days. The employee suspended may appeal his suspension to the Board of Directors within forty-eight (48) hours, if he feels that he has been suspended without sufficient cause. If his appeal is sustained, he will be reinstated and reimbursed for time lost.

Section 2. Discharge:

A Class "A" stockholder employee may not be discharged except with the approval of the majority of the members of the Board of Directors who are elected by the Class "A" stockholders. If the Class "A" stockholder so discharged is unwilling to accept the decision of said Directors, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that his discharge be reviewed at a meeting of the Class "A" stockholders called for the purpose in accordance with the provisions of the By-laws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective.

Section 3. Disability:

Disability resulting in termination of employment is defined as that condition existing when an employee—Class "A" stockholder has become physically or mentally disabled to the extent that he is permanently unable to work and when such disability has been determined by a majority of a board of three (3) doctors chosen one by the employee, one by the General Manager and one by

Petitioners' Exhibit No. 4—(Continued)

the two thus chosen. The decision of this board shall be submitted in writing to the General Manager, and shall be final.

Section 4. Retirement:

Within one (1) year after both the plywood plant and the sawmill are in production, the Board of Directors shall adopt a retirement plan satisfactory to the Class "A" stockholders for all or part of the employees, upon such terms and conditions as seem advisable, provided such plan is approved by a separate vote of a majority of the Directors elected by the Class "B" stockholders.

Section 5. Duty in Armed Services:

Any employee-stockholder answering the call to duty in the Army, Navy or any of their direct branches during any period of national emergency, either for training or for service, shall be granted leave of absence and retain all rights and privileges as an employee-stockholder including dividend and voting rights but shall not be entitled to wages during such absence. Said employee-stockholder shall report as soon as possible to the Company upon completion of his service.

Article VI.

Meetings of Stockholders

Section 1. Annual:

The first annual meeting of the stockholders shall be held in Tacoma, Washington, on November 23, 1947. Thereafter the annual meetings of the stockholders shall be held on the first Sunday of May

Petitioners' Exhibit No. 4—(Continued)

of each year at 10:00 o'clock a.m. of said day at the principal office for the transaction of the business of the corporation, or at such other place within or without the State of Nevada designated by the Board of Directors. In the event that the first Sunday in May of any year is a legal holiday, the meeting shall be held on the next succeeding Sunday in May, not a legal holiday.

Section 2. Special:

Special meetings of all the stockholders or of stockholders holding Class "A" or Class "B" stock (where the purpose of the meeting relates only to such class), for any purpose or purposes whatsoever, may be called at any time by the President or by the Board of Directors. Such meetings may also be called by stockholders holding 20 per cent (20%) of either class of stock. Upon receiving written request for such meeting from the stockholders the Secretary shall call a special meeting.

Section 3. Notice:

Written notice of any meeting of stockholders shall be given to each stockholder entitled thereto not less than ten (10) days before such meeting in the manner prescribed by statute, and shall specify the day and hour and place of meeting, provided that notice of special meetings shall specify also the general nature of the business to be transacted.

Section 4. Quorum:

No meeting of stockholders shall transact busi-

Petitioners' Exhibit No. 4—(Continued)

ness unless a majority of the shares entitled to vote thereat is represented, except to adjourn from day to day, or until such time as may be deemed proper.

Article VII.

Capital Stock

Section 1. Capital stock shall be issued and transferred only as provided in the Articles of Incorporation. Transfers of certificates of stock shall be made only on the books of the corporation, and before a new certificate is issued the old certificate must be surrendered for cancellation.

Article VIII.

Amendments

Except as herein provided, these Bylaws may be amended or repealed or new Bylaws may be adopted only by a majority vote of the holders of each class of stock, voting separately.

Article II, Section 3 (a) and Article V, Sections 1, 2, and 3, may be amended and shall only be amended by majority vote of the Class "A" stockholders. Article II, Section 3 (b) may be amended and shall only be amended by majority vote of the Class "B" stockholders.

Agreement of Merger dated September 9, 1947, merging the Coastal Plywood Corporation, a Washington corporation, with and into the Coastal Plywood & Timber Company, a Nevada corporation the surviving corporation.

Petitioners' Exhibit No. 4—(Continued)

Filed at the request of McMicken, Rupp & Schweppe, Attorneys, 657-671 Colman Bldg., Seattle 4, Wash., December 1, 1947.

JOHN KOONTZ,
Secretary of State.

[Endorsed]: Filed February 11, 1952.

PETITIONERS' EXHIBIT No. 5

Amended Bylaws of
Coastal Plywood & Timber Company

Article I.

Place of Business

The principal office in the State of Nevada for the transaction of the business of the corporation shall be located at Room 1, Blitz Building, 43 Sierra Street, Reno, Nevada; the principal office in California for the transaction of the business of the corporation shall be located at Cloverdale, Sonoma County, California.

Article II.

Directors

Section 1. Powers. All corporate powers (subject to limitations prescribed in the Articles of Incorporation, these Bylaws and by law) shall be exercised by or under the control of and the business and affairs of this corporation shall be con-

Petitioners' Exhibit No. 5—(Continued)
trolled by a Board of Directors, at least a majority of whom shall be stockholders.

Section 2. Number. The authorized number of directors of this corporation shall be nine (9).

Section 3. Election and Term. Three directors shall be elected at each annual meeting, by each receiving a majority of the votes cast, who shall hold office for a term of three years or until their successors are elected and qualified. A majority of the stockholders at any special meeting called for that purpose may remove any director and fill the vacancy for the unexpired term. The votes for the election of a director shall be determined by further balloting until a director is elected by a majority of the votes cast.

Section 4. Nominating Committee. Prior to any annual meeting of the stockholders, the President shall appoint a nominating committee of stockholders other than directors to prepare a list of names eligible for election as directors. The committee, at least twenty (20) days prior to the date of such annual meeting, shall make their written report to the President specifying the names of those selected as such candidates, which list shall accompany the notice of such meeting. Nothing herein shall be construed to prevent nominations for directors from the floor at such meeting.

Section 5. Vacancies. Subject to the right of the stockholders to fill vacancies as above provided, vacancies occurring on the Board of Directors shall be filled by appointment of the Board, such ap-

Petitioners' Exhibit No. 5—(Continued)

pointees to hold office until the next succeeding election by the stockholders.

Section 6. Duties. The Board of Directors shall, in addition to the duties provided herein and by law, cause an audit to be made of the books of the company by a certified public accountant not less frequently than at the end of each fiscal year ending on December 31 of each year.

Section 7. Meetings. Regular monthly meetings of the Board of Directors shall be held at the call of the President, or if he be absent or be unable or refuse to call such meeting, of the Vice-President, or of any two directors, at a time to be fixed in the call, at the principal office of the corporation in California, or at any place which shall be designated from time to time by resolution of the Board of Directors or by written consent of all members of the Board. Five (5) days' notice of such meeting shall be given in writing.

Special meetings of the Board for any purpose or purposes whatever shall be called at any time by the President, or if he be absent or be unable or refuse to act, by the Vice-President, or by any two directors, upon five (5) days' notice in writing given to each director. Special meetings may be held at the principal office of the corporation in California or at any place which may be designated from time to time by resolution of the Board or by written consent of all members of the Board.

Section 8. Quorum. A majority of the authorized number of directors shall constitute a quorum.

Petitioners' Exhibit No. 5—(Continued)

Article III.

Officers

Section 1. Election and Qualification. The officers of this corporation shall be a President, Vice-President, Secretary, Treasurer, and General Manager, who shall be appointed by the Board of Directors. Each of said officers shall serve until he shall resign or be removed or be disqualified, or until his successor shall be elected. The President and Vice-President must be Directors; the Secretary, Treasurer and General Manager may, but need not be Directors. All of such officers must be stockholders with the exception of the General Manager, who need not be a stockholder.

Section 2. President. The President shall:

- (1) Preside at all meetings of the Board of Directors and at all meetings of the Stockholders;
- (2) Call meetings of the Board of Directors;
- (3) Exercise such other powers and perform such other duties as may be prescribed by the Board of Directors or these Bylaws.

Section 3. Vice-President. In the absence or incapacity of the President, the Vice-President shall perform the duties of the President, and shall also perform such other duties as may be prescribed for him by the Board of Directors.

Section 4. Secretary. The Secretary shall:

- (1) Keep a book of minutes at the principal office of the corporation or such other place as the Board of Directors shall order, of all meetings of

Petitioners' Exhibit No. 5—(Continued)

the Directors and stockholders in the form and manner required by law;

(2) Keep at the principal office or at the office of the corporation's transfer agent a share register or a duplicate share register, showing the details required by law, and also all other books of the corporation excepting books of account;

(3) Keep at the principal office open to inspection by stockholders at all reasonable times, the original or a certified copy of the Bylaws of the corporation as amended or otherwise altered to date:

(4) Keep the corporate seal and affix it to all papers and documents requiring a seal;

(5) Attend to the giving and serving of all notices of the corporation required by law or these Bylaws to be given;

(6) Attend to such correspondence as may be assigned to him and perform all other duties incidental to his office or prescribed by the Board of Directors or by law.

Section 5. Treasurer. The Treasurer shall:

(1) Keep and maintain open to inspection by any Director at all reasonable times, adequate and correct accounts of the properties and business transactions of the corporation, which shall include all matters required by law and be in form as required by law; and shall send each Director regular monthly balance sheet and operating statement of the company on or before the 15th day of each

Petitioners' Exhibit No. 5—(Continued)

month covering the operations of the preceding month.

(2) Have the care and custody of the funds and valuables of the corporation and deposit the same in the name of and to the credit of the corporation with such depositaries as the Board of Directors may designate;

(3) Disburse the funds of the corporation as he may be ordered by the Board, taking proper vouchers for such disbursements; all checks of the corporation shall be signed by such person or persons and in such manner as, from time to time, shall be determined by resolution by the Board.

(4) Render to the President or to the Board of Directors, whenever they may require it, an account of all his transactions as Treasurer, and a financial statement in form satisfactory to them, showing the condition of the corporation;

(5) Have such other powers and perform such other duties as may be prescribed by the Board of Directors.

Section 6. Bonds. Any officer or other person having custody of or handling the funds or property of the corporation shall furnish a bond satisfactory to the Board of Directors, the cost of such bond to be paid by the corporation.

Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge

Petitioners' Exhibit No. 5—(Continued)

such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation.

Article IV.

Meetings of Stockholders

Section 1. Annual. The annual meeting of the stockholders shall be held at the principal office of the corporation in California on the first Sunday of May of each year at 10 o'clock a.m., or at such other time and place as may be determined by the Board of Directors. In the event that the first Sunday in May is a legal holiday, the meeting shall be held on the next succeeding Sunday not a legal holiday.

Section 2. Special. Special meetings of the Stockholders for any purpose or purposes whatsoever may be called at any time by the President or by the Board of Directors. Special meetings may also be called by stockholders holding at least 20% of the issued and outstanding stock. Upon receiving written request for such meeting from the stockholders, the Secretary shall call such meeting.

Section 3. Notice. Written notice of any meeting of stockholders shall be given to each stockholder entitled thereto not less than ten (10) days before such meeting in the manner prescribed by statute, which notice shall specify the day and hour and place of such meeting, provided that notice of special meetings shall also specify the general nature of the business to be transacted.

Section 4. Quorum. No meeting of stockholders

Petitioners' Exhibit No. 5—(Continued)

shall transact business unless a majority of the shares entitled to vote thereat is represented, except to adjourn from day to day until such time as may be deemed proper.

Article V

Capital Stock

Section 1. Capital stock shall be issued and transferred only as provided in the Articles of Incorporation. Transfers of certificates of stock shall be made only on the books of the corporation, and before a new certificate is issued the old certificate must be surrendered for cancellation.

Article VI.

Section 1. Power of Stockholders. New Bylaws may be adopted or these Bylaws may be amended or repealed by the vote of stockholders entitled to exercise a majority of the voting power of the corporation, or by the written assent of such stockholders, except as otherwise provided by law or by the articles of incorporation.

Section 2. Power of Directors. Subject to the right of stockholders as provided in Section 1 of this Article VI to adopt, amend or repeal Bylaws, Bylaws other than the bylaw or amendment thereof changing the authorized number of directors may be adopted, amended or repealed by the Board of Directors.

I, H. F. Tileston, hereby certify that I am Secretary of Coastal Plywood & Timber Company, a

Petitioners' Exhibit No. 5—(Continued)

corporation, that the foregoing is a true copy of the amended Bylaws of Coastal Plywood & Timber Company as adopted by the stockholders on the 10th day of September, 1950, at a special meeting of said stockholders; and that said Amended Bylaws have not been changed or rescinded.

/s/ H. F. TILESTON,
Secretary.

[Endorsed]: Filed February 11, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties, viz.:

Order appointing trustee and prescribing powers and duties.

Affidavit of Webster V. Clark in support of motion for leave to litigate suit in State Court.

Petition of Trustee for authority to employ a manager, for approval of rates of compensation to

be paid said manager and other agents and employees of the debtor, etc.

Order authorizing Trustee to employ a manager, for approval of rates of compensation to be paid said manager and other agents and employees of the debtor, etc.

Report of the Trustee.

Order approving retention of Trustee in Office.
Stipulation.

Petition for reinstatement of employees with back pay.

Motion of Fred G. Stevenot, Trustee of debtor, to dismiss petition for reinstatement of employees, etc.

Interlocutory order reinstating employees with back pay.

Notice of appeal from interlocutory order reinstating employees with back pay.

Statement of points upon which appellant intends to rely on appeal.

Motion to require Trustee and appellant to file transcript of record and supersedeas bond.

Order extending time to docket appeal.

Order extending time to docket appeal.

Order reinstating employees with back pay.

Order requiring Trustee and appellant to file supersedeas bond.

Designation by appellant of contents of record on appeal.

Designation by appellees of additional portions of the record, proceedings and evidence to be included in the record on appeal.

Affidavit in support of memorandum of costs and disbursements.

Letter of May 29th, 1952, in opposition to taxation of costs.

Designation of points upon which appellant intends to rely on appeal from order requiring trustee to file supersedeas bond.

Letter of June 3rd, 1952, in opposition to taxation of costs.

Letter of June 3rd, in support of motion to tax costs.

Statement of points upon which appellant intends to rely on appeal from order reinstating employees with back pay, filed May 16th, 1952.

Decision re taxation of costs in form of letter dated June 6th, 1952.

Notice of motion by petitioners to review taxation of costs by Clerk and to retax costs.

Order granting motion to retax costs.

Notice of appeal from order retaxing costs.

Statement of points upon which appellant intends to rely on appeal from the order granting motion to retax costs, filed herein on July 11th, 1952.

Designation by trustee and appellant of contents of record on appeal from order granting motion to retax costs.

Designation by appellees of additional portions of the record, proceedings and evidence to be included in the record on appeal.

In Witness Whereof, I have hereunto set my

[Endorsed]: No. 13393. United States Court of Appeals for the Ninth Circuit. Fred G. Stevenot, Trustee of Coastal Plywood & Timber Company, a Corporation, Debtor, Appellant, vs. J. W. Norberg, Nils G. Matson, Merritt W. Tallman, Milo F. Barnhart, Roland C. Zimmermann, Floyd C. Jackson, Gladys M. Zimmermann, Edwin H. Jasmann, Frank Sutton, George F. Scott and John E. Vick, Appellees. Transcript of Record, Supplemental Transcript of Record, and Second Supplemental Transcript of Record. Appeals From the United States District Court for the Northern District of California, Northern Division.

Transcript of Record Filed May 22, 1952.

Supplemental Transcript of Record Filed July 31, 1952.

Second Supplemental Transcript of Record Filed September 18, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 13,393

In the Matter of:

COASTAL PLYWOOD & TIMBER COMPANY,
a Corporation,

Debtor.

In Proceedings for the Reorganization
Of a Corporation

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Now comes Fred G. Stevenot, Trustee of the Debtor above named, and appellant above named, and sets forth a statement of the points upon which appellant intends to reply on appeal, as follows:

1. Said Appellant refers to the Statement of Points Upon Which Appellant Intends to Rely Upon Appeal, filed in the above-entitled matter in the Office of the Clerk of the United States District Court, in and for the Northern District of California, Northern Division, on the 7th day of March, 1952, and incorporates said statement of points herein as fully and to all intents and purposes as though said points were specifically set forth herein.

In addition to the foregoing, said Appellant hereby designates the following additional points upon which he intends to rely on appeal:

(a) The District Court erred in making its Interlocutory Order Reinstating Employees With Back Pay.

(b) The District Court erred in making its Order Requiring Trustee and Appellant to File a Supersedeas Bond.

Dated May 27th, 1952.

ORRICK, DAHLQUIST, NEFF
& HERRINGTON,

By /s/ GEORGE HERRINGTON,

/s/ STERLING CARR,

Attorneys for Said Appellant.

[Endorsed]: Filed May 28, 1952.

No. 13,393

IN THE
United States
Court of Appeals
For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a Corpo-
ration, Debtor,
Appellant,

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT
W. TALLMAN, MILO F. BARNHART, ROLAND
C. ZIMMERMANN, FLOYD C. JACKSON,
GLADYS M. ZIMMERMANN, EDWIN H. JAS-
MANN, FRANK SUTTON, GEORGE F. SCOTT
and JOHN E. VICK,
Appellees.

Opening Brief of Appellant

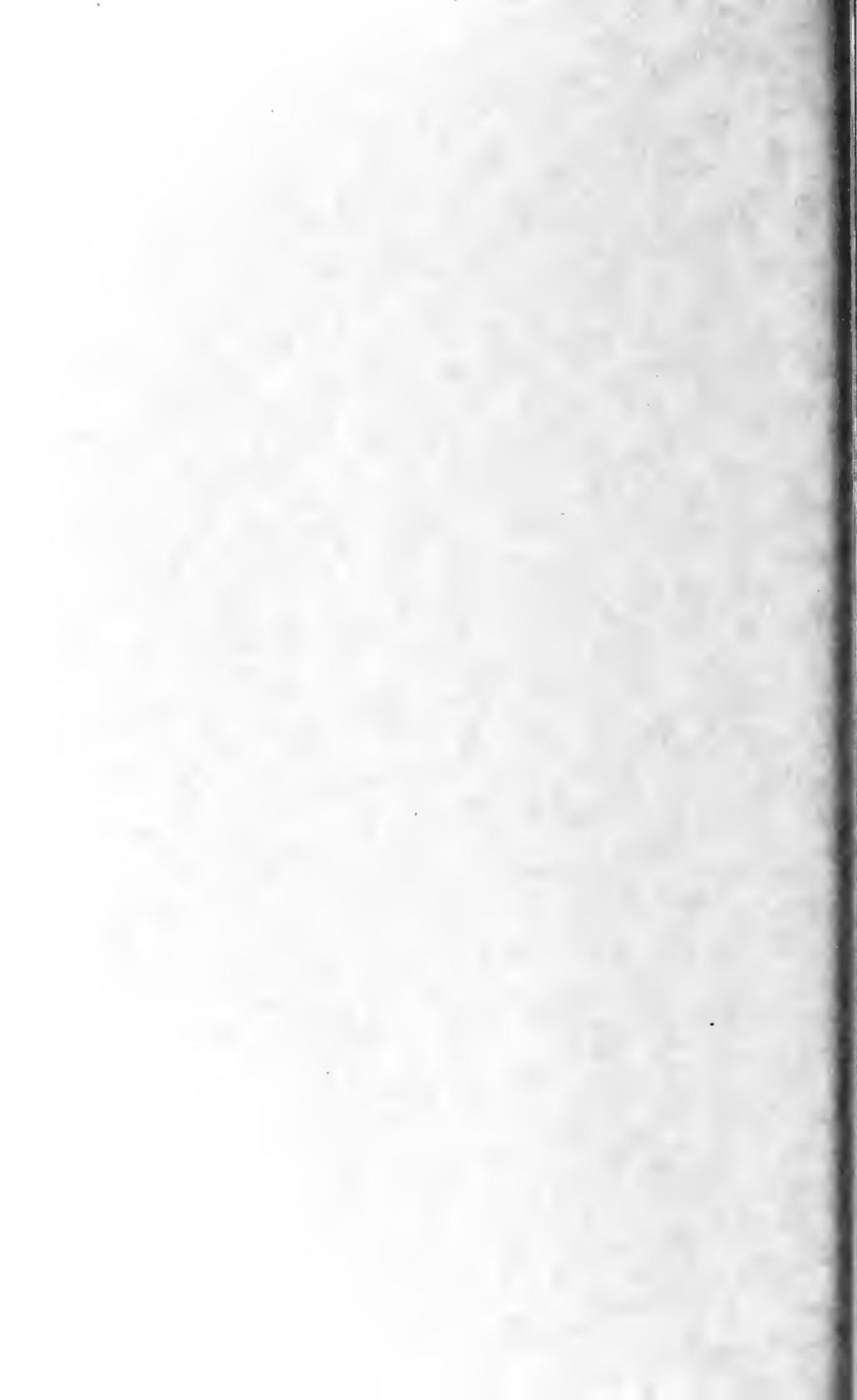
Appeals from the United States District Court,
Northern District of California,
Northern Division

ORRICK, DAHLQUIST, NEFF & HERRINGTON
405 Montgomery Street
San Francisco 4, California

STERLING CARR
1 Montgomery Street
San Francisco 4, California

Attorneys for Appellant.

FILED
DEC 22 1952
FRANK P. O'BRIEN
CLERK



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THE HISTORY OF THE
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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a Corpo-
ration, Debtor, *Appellant,*

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT
W. TALLMAN, MILO F. BARNHART, ROLAND
C. ZIMMERMANN, FLOYD C. JACKSON,
GLADYS M. ZIMMERMANN, EDWIN H. JAS-
MANN, FRANK SUTTON, GEORGE F. SCOTT
and JOHN E. VICK, *Appellees.*

Opening Brief of Appellant

Appeals from the United States District Court,
Northern District of California,
Northern Division

STATEMENT OF JURISDICTION

1. Jurisdiction of District Court.

Appellant is the Trustee of Coastal Plywood & Timber Company, Debtor in proceedings for the reorganization of said Company pursuant to Chapter X of the *Bankruptcy*

Act now pending before the United States District Court for the Northern District of California, Northern Division (Tr. pp. 48-49). On February 9, 1952, appellees filed their petition in said proceedings alleging, in substance, that they were laid off or discharged as employees of the Debtor on December 28, 1951, and seeking reinstatement as such employees and reimbursement for amounts lost as a result of the layoff or discharge (Tr. pp. 10-18).

On February 11, 1952, appellant filed his motion to dismiss said petition upon the ground, among others, that:

“1. The above-entitled Court has no jurisdiction of these proceedings for reinstatement or by reason of any of the things or facts set forth in said petition for reinstatement.” (Tr. pp. 19, 26)

Said motion to dismiss was denied (Tr. pp. 27, 35), but the exact basis upon which the District Court predicated jurisdiction is not clear to appellant.

2. Jurisdiction of Court of Appeals.

The orders from which these appeals are taken were entered by the United States District Court in proceedings pursuant to Chapter X of the *Bankruptcy Act*. This Court is vested with appellate jurisdiction by Section 24 of the *Bankruptcy Act* (11 U.S.C.A., Sec. 47), which provides, in part, as follows:

“a. The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now, or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bank-

ruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact * * *.”

“b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal. * * *”

and by Section 121 of the Bankruptcy Act (11 U.S.C.A., Sec. 521), which provides:

“Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.”

STATEMENT OF THE CASE

Four appeals are involved in this matter, namely:

- (a) Appeal from Interlocutory Order Reinstating Employees with Back Pay, filed February 25, 1952 (Tr. p. 28).
- (b) Appeal from Order Reinstating Employees with Back Pay, filed May 21, 1952 (Tr. p. 59).
- (c) Appeal from Order Requiring Trustee and Appellant to file Supersedeas Bond, filed May 21, 1952 (Tr. p. 58).
- (d) Appeal from Order Retaxing Costs, filed July 18, 1952 (Tr. p. 86).

All of the orders appealed from were entered in proceedings pursuant to Chapter X of the *Bankruptcy Act* entitled “In the matter of Coastal Plywood & Timber Company, a Corporation, Debtor (No. 12223),” which proceedings are pending in the Northern Division of the United States District Court for the Northern District of California.

Appellant was appointed Trustee of said Debtor on November 1, 1951, by Order naming him as such and pre-

scribing his powers and duties (Tr. pp. 3-8, 48-49), in which Order it is provided (Tr. p. 5):

“It is Further Hereby Ordered that the trustee appointed herein be and he is hereby authorized and directed, pending further order herein, to conduct and operate the business of the debtor and to manage, maintain and keep in proper condition and repair the assets, properties and business of the debtor, wherever situated; to employ and discharge, and to fix, subject to the approval of the court, the rate of compensation of all officers, managers, superintendents, agents and employees; * * *.”

In due course, thereafter, the District Court wherein such proceedings were pending made its Order approving the retention of the appellant in office as such Trustee (Tr. p. 8).

On and prior to December 28, 1951, each of the appellees was an employee of the Debtor, and each of the appellees was then, and now is, the holder of one share of the outstanding capital stock of the Debtor (Tr. p. 36). Effective as of the close of business on December 28, 1951, each of the appellees was discharged from the employment of the Debtor by appellant, acting through his general manager (Tr. p. 50).

At the time each of the appellees purchased his share of stock in the Debtor, the Articles of Incorporation of the Debtor limited stock ownership to active employees and persons acceptable to the Board of Directors as future active employees (Tr. pp. 36, 37, 168). Said Articles further provided that a stockholder may not “sell, transfer or assign his share” until and unless he first gives to the officers of the Debtor written notice of his intention and

extends to the Debtor an option to purchase such share (Tr. p. 37).

Paragraph (d) of Article IX of said Articles of Incorporation contained the following provision (Tr. p. 39):

“The specific provisions governing discharge, retirement, or disability shall be set forth in the Bylaws.”

This provision was also set forth on the stock certificates issued to appellees (Tr. pp. 106-112). Section 2 of Article V of the by-laws of the Debtor at that time provided (Tr. pp. 45, 197):

“Section 2. Discharge:

“A Class ‘A’ stockholder employee may not be discharged except with the approval of the majority of the members of the Board of Directors who are elected by the Class ‘A’ stockholders. If the Class ‘A’ stockholder so discharged is unwilling to accept the decision of said Director, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that this discharge be reviewed at a meeting of the Class ‘A’ stockholders called for the purpose in accordance with the provisions of the Bylaws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective.”

Article VIII of said by-laws authorized the amendment of said by-laws in the following manner (Tr. p. 200):

“ARTICLE VIII.

“Amendments”

“Except as herein provided, these Bylaws may be amended or repealed or new Bylaws may be adopted

only by a majority vote of the holders of each class of stock, voting separately.

“Article II, Section 3(a) and Article V, Sections 1, 2, and 3, may be amended and shall only be amended by majority vote of the Class ‘A’ stockholders. Article II, Section 3(b) may be amended and shall only be amended by majority vote of the Class ‘B’ stockholders.”

On September 10, 1950, by vote of a majority of the stockholders of the Debtor, its by-laws were duly amended so as to eliminate the above-quoted provisions relating to “Discharge” of shareholders and to substitute the following provision (Tr. pp. 47, 48, 140-153, 201-209):

“The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation.”

This amendment was made at the request of representatives of the principal creditors of the Debtor (Tr. pp. 140-145). The trial court concluded that, although this amendment was authorized by the by-laws as they existed prior to the amendment, it did not abrogate the rights of appellees under such pre-existing by-laws and ordered that appellees be reinstated and that they be reimbursed for lost wages (Tr. pp. 27, 47, 48, 53-54).

Thereafter, the trial court directed appellant to file a supersedeas bond in the amount of \$10,000 in connection

with these appeals (Tr. pp. 56-58), but this order was stayed by this Honorable Court on July 9, 1952.

On June 6, 1952, the Clerk of the United States District Court taxed and allowed against the appellant costs in the sum of \$4 (Tr. pp. 81-82). On July 11, 1952, upon motion by appellees, the United States District Court retaxed costs to allow the additional sum of \$203.20, constituting the sum of \$4 for the cost of a transcript of certain remarks of the District Court and the sum of \$199.20 for witness fees and mileage (Tr. pp. 82-85). With one exception, the sum claimed as witness fees and mileage was for the attendance of appellees (Tr. pp. 89-105).

ASSIGNMENTS OF ERROR

1. Orders Reinstating Appellees with Back Pay.

The first two appeals are directed to the interlocutory and subsequent Orders reinstating appellees with back pay (Tr. pp. 28, 59). The errors relied upon by appellant in seeking reversal of these Orders are set out in the "Statement of Points upon which Appellant Intends to Rely on Appeal from Order Reinstating Employees with Back Pay, Filed May 16, 1952," as follows (Tr. pp. 79-81):

"1. The District Court erred in denying appellant's motions to dismiss the petition for reinstatement of employees with back pay.

"2. The District Court erred in including in said Order last above referred to and filed herein upon the 16th day of May, 1952, the provision requiring said Trustee to re-employ said petitioners named in said Order, and further in ordering that said Trustee pay to said petitioners and each of them the amounts set forth in said Order. The said District Court further

erred in ordering and directing said Trustee to pay to said petitioners any sums or amounts whatsoever.

“3. The District Court erred in granting the petition of said petitioners and further in ordering said Trustee to re-employ and reinstate said employees in their former or any other positions or employments.

“4. The District Court erred in granting the petition of petitioners for specific performance of their contract for personal services.

“5. The District Court erred in not holding that the original contract of employment contained on the back of the stock certificate issued to each of petitioners was amended and changed by the Amended Bylaws adopted by Debtor on September 10, 1950.

“6. The District Court erred in holding that Section 7 of Article III of said Bylaws, duly and regularly adopted by the said Stockholders of said Debtor on the 10th day of September, 1950 and reading as follows, to wit:

‘Section 7. General Manager. The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation’, did not give to and empower said General Manager of said Debtor full and uncontrolled right, power and authority to employ and discharge agents and employees of said Debtor at any time and for any reason or purpose whatsoever and which to him seemed best.

“7. The District Court erred in not holding that the failure of petitioners to offer their stock to Debtor,

as required by its Articles of Incorporation and/or Bylaws, before granting to a third party an option to purchase the same constituted a breach of contract with Debtor which entitled Debtor and appellant herein to discharge petitioners and each of them from their and each of their employment with Debtor.

“8. The District Court erred in substituting its judgment for that of the Trustee, appellant herein, and his General Manager in the ordinary operations of Debtor.”

2. Order Requiring Appellant to File Supersedeas Bond.

Appellant relies upon the following specifications of error in his appeal from this Order (Tr. pp. 73-74) :

“1. The District Court erred in making the Order requiring Trustee and Appellant to file a supersedeas bond and filed in the above-entitled Court on or about the 16th day of May, 1952.

“2. The District Court erred in requiring said Trustee and Appellant to cause to be prepared and filed with said Court a supersedeas bond in the sum of Ten Thousand Dollars conditioned as set forth in said Order.

“3. The District Court was without right, power or jurisdiction to make said Order filed herein as aforesaid on or about May 16, 1952, or to require said Trustee as a Trustee in Bankruptcy and an appellant herein to make or file said supersedeas bond.

“4. The District Court erred in making its said Order requiring said Trustee and appellant to make said payments to said petitioners in the amounts set forth in said Order.

“5. The District Court erred in providing in said Order that said requirement for the payment of said sums to said petitioners as set forth in said Order should be made part of or become part of the Inter-

locutory Order reinstating employees with back pay upon the ground, among others, that an appeal had been taken from said Interlocutory Order reinstating employees with back pay prior to the making of said Order filed herein on or about May 16, 1952, and that by reason thereof said Court was without jurisdiction, right or authority to make said Order filed on or about May 16, 1952, a part of said Interlocutory Order reinstating employees with back pay.”

3. Order Granting Motion to Retax Costs.

Appellant assigns the following errors with respect to the Order granting appellees' motion to retax costs (Tr. p. 87):

“1. The District Court erred in denying appellant's motion to retax costs on the proceedings to compel the reinstatement of appellees with back pay.

2. The District Court erred in allowing the items of \$4.00 for the transcript of remarks of the Court at the conclusion of the argument on Friday, February 15, 1952.

3. The District Court erred in allowing witness fees and mileage as per Schedule I attached to the costs bill, filed herein and amounting to \$199.20.”

The foregoing assignments of error are expanded hereinafter under the Argument relating to the individual orders.

ARGUMENT**I.****The Trial Court Erred in Ordering Reinstatement
of Appellees with Back Pay**

Appellees assert, and the trial court held, that their dismissal on December 28, 1951, was a breach of their employment contracts embodied in the Articles of Incorporation and by-laws of the Debtor. We respectfully submit that the trial court erred in so ruling for the reasons that:

(A) The contract originally existing between appellees and debtor was amended on September 10, 1950, to eliminate the provisions relied upon by appellees; such provisions were not in effect at the time of the discharge of appellees on December 28, 1951 and are not now in effect.

(B) Appellees breached their contracts with the Debtor and thereby subjected themselves to dismissal.

(C) Furthermore, the attempt of appellees to compel appellant, as trustee, to re-employ them is an attempt to compel specific performance of a personal service contract, which is prohibited by the statutes of the State of California and by the decisions of the California and Federal Courts.

A. THE CONTRACT ORIGINALLY EXISTING BETWEEN APPELLEES AND THE DEBTOR WAS AMENDED ON SEPTEMBER 10, 1950, TO ELIMINATE THE PROVISIONS RELIED UPON BY APPELLEES; SUCH PROVISIONS WERE NOT IN EFFECT AT THE TIME OF THE DISCHARGE OF APPELLEES ON DECEMBER 28, 1951, AND ARE NOT NOW IN EFFECT.

Specifically, appellees rely upon Section 2 of Article V of the by-laws of the Debtor as they existed when appellees acquired their stock in the Debtor. This Section then provided (Tr. p. 45):

“Section 2. Discharge:

“A Class ‘A’ stockholder employee may not be discharged except with the approval of the majority of the members of the Board of Directors who are elected by the Class ‘A’ stockholders. If the Class ‘A’ stockholder so discharged is unwilling to accept the decision of said Directors, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that his discharge be reviewed at a meeting of the Class ‘A’ stockholders called for the purpose in accordance with the provisions of the Bylaws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective.”

With this exception, the contract between the Debtor and appellees has never restricted discharge of the appellees; the Articles of Incorporation and stock certificate both refer to the by-laws for provisions relating to discharge (Tr. pp. 39, 112).

Admittedly, the above-quoted restrictions were not complied with in the present case. However, appellees’ petition ignores Article VIII of said by-laws, which provided for amendments thereto, as follows (Tr. p. 200):

“Article VIII.

Amendments

“Except as herein provided, these Bylaws may be amended or repealed or new Bylaws may be adopted only by a majority vote of the holders of each class of stock, voting separately.”

Article II, Section 3(a) and Article V, Sections 1, 2 and 3, *may be amended* and shall only be amended by majority vote of the Class ‘A’ stockholders. Article II,

Section 3(b) may be amended and shall only be amended by majority vote of the Class 'B' stockholders."*

They further ignore the fact that subsequently, on or about September 10, 1950, the by-laws were amended, as authorized by the above quoted Article VIII thereof, to eliminate the provisions relating to discharge of employees and to provide in their place and stead that the General Manager could at any time, for any reason, discharge employees. The lower Court so found (Tr. pp. 47-8):

"5. Subsequently on or about September 10, 1950, the bylaws of the Debtor company were amended by a vote of a majority of its shareholders, as authorized therein, to, among other things, eliminate the aforesaid provisions relating to job security and job tenure which had theretofore constituted part of said bylaws and to include the following further provision, to wit:

'Section 7. General Manager: The General Manager shall have general supervision and direction of the business and affairs of the corporation. Without limiting, except as otherwise herein provided, his other powers, he may employ, suspend and discharge such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their duties, terms of employment and compensation.'

We are unable to perceive how appellees can claim any rights whatsoever under former Section 2 of Article V of the Debtor's By-laws since this section had been duly and effectively eliminated over a year prior to their discharge. It is axiomatic, of course, that where a contract contains

*Unless otherwise noted, all emphasis herein is ours.

a provision for its amendment in a prescribed manner, an amendment adopted in such manner is binding upon all of the parties to the contract. Necessarily so, since that is the agreement of the parties.

This axiom would appear to have particular application to contracts embodied in corporate articles and by-laws, since the power of amendment in a feasible manner is vital when the parties to a contract are numerous. That it does have application to such contracts has been squarely and unequivocally recognized by the California Supreme Court on a number of occasions. Thus, in *Baldwin v. Miller & Lux*, 152 Cal. 454, the California Supreme Court held that a written agreement for the formation of a corporation and the articles of incorporation thereof could be amended to require the distribution of a stated sum annually among interested parties, and the sale of property for that purpose, and that such amendment was binding upon stockholders who voted against, as well as those who voted for, the amendment. In this connection, the Court stated:

“* * * 2. It was contended in the petition for rehearing that there was no power to amend the articles of incorporation so as to provide for the annual division of at least three hundred and sixty thousand dollars among the parties interested, or so as to require the sale of sufficient property for that purpose. The point is not well taken. *The original agreement provided that, as to the subdivisions numbered 7 to 11, inclusive, of the agreement, and the corresponding subdivisions of the articles of incorporation, amendments could be made by the vote or written consent of stockholders representing at least four fifths of the capital stock. This was binding on the appellant, and such*

amendments could be made by four fifths of the stockholders without her consent and against her will.” (152 Cal. at p. 458)

In fact, the power of amendment need not be expressed in the corporate charter or by-laws but may be supplied by law. See *Schroeter v. Bartlett Syndicate Bldg. Corp.*, 8 Cal.(2d) 12, and *DeMello v. Dairyman's Co-op. Creamery*, 73 C.A.(2d) 746, enunciating and applying the settled rule that the contract between a corporation and its stockholders embodies the articles of incorporation, by-laws *and all pertinent statutes*, including the reserved power to amend such laws.

As a corollary of this rule, it has been held that the articles of incorporation may be amended to make outstanding shares of capital stock assessable, even for the purpose of paying debts existing prior to the amendment. *Wilson v. Cherokee Drift Mining Co.*, 14 Cal.(2d) 56. The California Supreme Court found no merit in the contention that, because stock was not assessable when the complaining shareholders purchased their stock, the amendment resulted in an impairment of their contracts, stating:

“The first and principal contention of plaintiff is that the assessment in this case involves a denial of due process of law, and an impairment of the obligation of contract. The right of the corporation to amend its articles to provide for the power of assessment is of course conceded, and it is likewise conceded that *one who becomes a stockholder makes his contract in anticipation of any possible changes in the law under the state's reserved power* (see, generally, Ballantine & Sterling, California Corporation Laws, 1938 ed., p. 5; *Heller Inv. Co. v. Southern T. & T. Co.*, 17 Cal. App.

(2d) 202; (61 Pac.(2d(807))); but it is asserted that to assess the stockholder for debts existing prior to the amendment of the articles is an unconstitutional application of the law.

“Plaintiff relies upon *Rainey v. Michel*, 6 Cal.(2d) 259; (57 Pac.(2d) 932, 105 A.L.R. 148), a case wholly distinguishable, for there the attempt was made to apply a *new law* imposing a special stockholders’ liability to *creditors* for debts incurred prior to the law’s enactment. This court pointed out that at the time the debts were contracted the creditors had no such right against the stockholders, and declared that to impose this liability retroactively would be a denial of due process. This case, dealing with liability to creditors, has no relevancy where, as here, *we are concerned with the interrelations of the corporation and its stockholders*. (See *Schroeter v. Bartlett Syndicate Building Corp.*, 8 Cal.(2d) 12 (63 Pac.(2d) 824); *Heller Inv. Co. v. Southern T. & T. Co.*, *supra*.)

“When plaintiff became a stockholder he knew that under the law then in existence the power of assessment could be conferred on the corporation by amendment of the articles, and that this power could be exercised to raise funds for the corporation, for the purpose of paying any debts of the corporation owed at the time the assessment was levied, regardless of when they were incurred. No violation of his constitutional rights was involved in the making of that assessment.” (14 Cal.(2d) at pp. 57-58)

To the same effect see:

Farbstein v. Pacific Oil Tool Co., Ltd., 127 Cal. App. 157.

These principles are equally applicable to hybrid corporations containing many of the characteristics of a co-

operative. Thus in *Caldwell v. Grand Lodge*, 148 Cal. 195, it was held that a member of a mutual benefit society was bound by an amendment to a by-law which limited beneficiaries to members of his family, blood relatives and dependents, even though the by-laws at the time he became a member permitted any person or persons to be named beneficiaries. In this connection, the Court stated:

“Baker joined the order, agreeing specifically to abide by and conform to the by-laws in force or subsequently to be adopted. His compliance with such laws as were then in force or might thereafter be enacted was by his express agreement made a condition by which he was entitled to participate in the beneficiary fund of the order; and where the contract between the member and the order is as here disclosed *it is never to be disputed* that all subsequent rules, regulations, and by-laws, not in themselves unreasonable, against express law or public policy, enter into and govern all of his rights and relationship with the association. (*Wist v. Grand Lodge*, 22 Or. 271, [29 Pac. 610, 29 Am. St. Rep. 603]; *Masonic Ben. Assn. v. Serverson*, 71 Conn. 719 [43 Atl. 192].)” (148 Cal. at p. 199)

See also:

De Mello v. Dairyman's Coop. Creamery, 73 Cal. App. (2d) 746, 750.

This settled principle of California law is squarely applicable here. See *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161, 67 S.Ct. 237, 239; *Bryant v. Swofford Bros. Dry Goods Co.*, 214 U.S. 279, 290-91, 29 S.Ct. 614, 618; *Urban Properties Corp. v. Benson* (C.C.A.

9), 116 Fed.(2d) 321, holding that state law is to be applied in determining the rights of claimants against a debtor in reorganization or bankruptcy proceedings.

Moreover, the rule in other jurisdictions is the same. See, e.g.:

Hottenstein v. York Ice Machinery Corp. (C.C.A. 3),
136 Fed.(2d) 944, 950.

(“The right of the preferred stockholder in the instant case is to receive payment of his unpaid dividends in preference and priority to the payment of any dividend on the common stock. * * * Such a right should not be given the status of a vested property right in view of the power of self-amendment conferred on the defendant * * *. *In view of the power of self-amendment conferred upon the defendant we think it is clear that the intervening complainant may not claim the protection of the Contract Clause.*”)

Sovereign Camp, W.O.W. v. Smith (Okla.), 56 Pac.
(2d) 408, 410-11;

Bookman v. R. J. Reynolds Tobacco Co. (N.J.), 48
Atl.(2d) 646, 655;

Reynolds v. Supreme Council Royal Ancanum
(Mass.) 78 N.E. 129, 131;

Glos v. Bain (Ill.), 79 N.E. 111, 117;

Crittenden v. Southern Home Building & Loan Assn.,
36 S.E. 643, 645-6.

When each of the appellees acquired his share of stock in the Debtor, the by-laws expressly provided that they might be amended in a specific manner. In fact, Article VIII of said by-laws contained, both at the time such stock was acquired and at the time of the amendment relied

upon by appellant, a special provision governing amendment of certain specified provisions of the by-laws, including the provision upon which appellees rely, viz. Section 2 of Article V (Tr. p. 200). The second paragraph of Article VIII expressly provided that "Article V, Sections 1, 2, and 3, may be amended * * * by majority vote of the Class 'A' stockholders." Thus, we are not here interpreting a general power of amendment, but a *specific* power to change a *specific* provision. The amendment eliminating the restrictions upon which appellees rely was duly adopted, as the trial court found, in the manner authorized by the by-laws (Tr. p. 47). Appellees are therefore bound by the amendment and can claim no contract right to continuous employment. Their discharge by appellant, acting through the general manager, thus gave rise to no right of reinstatement or reimbursement of back pay.

Employees, as well as other persons, are bound by their contracts. Such was the ruling of the United States Supreme Court in *National Labor Relations Board v. Sands*, 306 U.S. 332, 59 S.Ct. 508, where it was stated:

"The Board finds that, in this situation, the respondent was under an obligation to send for the shop committee and again to reason with its members or to wait until the situation became such that it could operate its whole plant without antagonizing the employes' views with respect to departmental seniority. We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employes. No such request was

made prior to September 4th. Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. *It was at liberty to treat them as having severed their relations with the company because of their breach* and to consummate their separation from the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employe of his agreement, any more than it prohibits such discharge for a tort committed against the employer. As the respondent had lawfully secured others to fill the places of the former employes and recognized a new union, which, so far as appears, represented a majority of its employes, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employes.

“It is urged that the company's offer to re-employ four men as foremen on the basis of guaranteed annual compensation, at a lower hourly rate than had theretofore been paid them, is evidence to support the Board's finding of a refusal to bargain collectively with the union. The argument is that if the company had made a similar offer to all of the men this might have formed a basis of compromise, since one of the employes to whom an officer talked indicated that the men might be willing to take a cut in wages; but there is no evidence that the company had any thought of offering a similar contract to others than the foremen of departments, and the breach of contract of which the men were guilty left the company under no obligation to initiate negotiations for a new and different contract of employment with them. * * *” (306 U.S. at pp. 343-5, 59 S.Ct. at pp. 514-15.)

B. APPELLEES BREACHED THEIR CONTRACTS WITH THE DEBTOR, AND, BY REASON THEREOF, SUBJECTED THEMSELVES TO DISMISSAL.

Article IX, Section (a) of the Bylaws of Debtor, existing at the time appellees purchased their stock and still in full force and effect, provides that before any holder of stock may transfer or assign the same, it must first be offered to the company (Tr. p. 37). This appellees did not do (Tr. pp. 14, 16, 88, 89). Having admitted their failure to comply with their contracts, they may not now complain of a *subsequent* breach on the part of the Debtor. Under the settled doctrine enunciated in *National Labor Relations Board v. Sands*, quoted *supra*, appellant was well within his rights in discharging appellees. See also *Lewis Publishing Co. v. Henderson*, 103 Cal. App. 425, 429; *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 796; *Ravales v. Los Angeles Creamery Co.*, 36 Cal. App. 171. As stated in *Rathbun v. Security Mfg. Co.*, *supra*, "It is elementary that one party cannot compel another to perform while he himself is in default under the contract." (82 Cal. App. at p. 796.)

C. THE PETITION OF APPELLEES CONSTITUTES AN ATTEMPT ON THEIR BEHALF SPECIFICALLY TO ENFORCE PERSONAL SERVICE CONTRACTS, WHICH THE LAW DOES NOT PERMIT.

The petition of appellees (Tr. pp. 10, 12) alleges that they are entitled to "job tenure" by virtue of the contract embodied in the Articles and by-laws of the Debtor. In the prayer of such petition (Tr. p. 18) appellees pray that they be reinstated as employees of the Debtor. Such allegations and prayer definitely establish the petition as an attempt to specifically enforce contracts which, appellees assert, insure their continued employment by the Debtor.

That such contracts are not specifically enforceable is established by the Statutes and decisions of the courts of

this State and by the decisions of the Federal Courts. Thus, Section 3390 of the *Civil Code of the State of California* provides, in part, as follows:

“The following obligations cannot be specifically enforced:

- (1) An obligation to render personal service;
- (2) *An obligation to employ another in personal service; * * **”

The leading case establishing this rule in California is *Poultry Producers, Etc. v. Barlow*, 189 Cal. 278, where it was held that an agreement between a corporation organized by poultry raisers and a stockholder thereof requiring the latter to sell all of his products for certain stated years to the corporation, and obligating the corporation to resell the products and pay over the proceeds to the stockholder, is not enforceable either by injunction or by decree of specific performance, since such a contract is one of agency calling for services of the corporation of a highly personal nature. In this connection the Court stated:

“The rule that equity will not specifically enforce an obligation to render personal service has been assigned three distinct reasons for its existence. Some courts have based the rule upon the fact that it would be an invasion of one’s statutory liberty to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Another reason assigned for the rule, according to some of the authorities, is that, in view of the peculiar personal relation that results from a contract of ser-

vice, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically. It is said by the judges who based the rule upon this consideration of public policy that, where one of the contracting parties is to act as the confidential agent of the other, it is necessary, not only for the parties, but for the sake of society at large, that there should be entire harmony and a spirit of cooperation between the contracting parties. The third reason for the rule, as given by other authorities, is that it is inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services. For a discussion of these three bases of the rule, see the note to *H. W. Gossard Co. v. Crosby*, 6 L.R.A. (N.S.), p. 1125 et seq. * * *." (189 Cal. at pp. 288-9)

The *Poultry Producers* case has been cited with approval numerous times in subsequent decisions of the courts of this State, the last one, so far as we can ascertain, being *Columbia Pictures Co. v. DeToth*, 26 Cal.(2d) 753, at p. 761. To review all of the cases intermediate between the *Poultry Producers* and the *Columbia Pictures Co.* cases would only encumber this brief and would serve no useful purpose. The principles there involved are squarely applicable to the present case, and, we respectfully submit, compel a reversal of the decision of the lower court.

While, as already noted, appellee's rights are determined by California law, it might be pointed out that the rule applied in other jurisdictions, by both the Federal and State

courts, is the same. See, e.g., *Bethlehem Engineering Export Co. v. Christie* (C.C.A. 2), 105 F.(2d) 933, 935 (“* * * even though the discharge of an agent be a breach of contract which gives him a right of action, the court will not restore him to his position.”); *Bach v. Friden Calculating Mach. Co.* (C.C.A. 6, 1946), 155 Fed.(2d) 361; *Allbee v. Elms* (N.H.), 37 A.(2d) 790; *Hoffman Candy & Ice Cream Co. v. Department of Liquor Control* (Ohio), 96 N.E.(2d) 203; 49 Am. Jur., *Specific Performance*, Sec. 137, pp. 160-161.

Accordingly, we respectfully submit that the decision of the District Court compelling reinstatement of appellees and reimbursement for back pay must be reversed for the reasons that:

(1) The original contracts between appellees and the Debtor, providing for the manner of appellees' discharge, were effectively amended prior to their discharge to provide that such discharge rested in the judgment of the General Manager alone; therefore no breach of their contract resulted from the discharge.

(2) In any event, appellees themselves breached said contract prior to the discharge by extending an option to purchase their shares without first offering them to the Debtor; and

(3) The petition of appellees is an attempt to compel specific performance of personal service contracts, contrary to the statutes of the State of California and the decisions of the California and Federal Courts.

II.

**The Court Erred in Ordering Appellant
to File a Supersedeas Bond**

Preliminarily, it might be noted that if this Court reverses the District Court on either of the grounds set forth in subdivisions I or II of this Argument, this particular appeal would become moot.

On the same day that the District Court made its final order for the re-employment of appellees, it also made its order requiring the appellant to file a supersedeas bond, which order is set out in full at pages 56 to 58, inclusive, of the Transcript. To this order appellant in due course filed his appeal (Tr. p. 58), together with his designation of points upon which he intended to rely in his appeal from such order (Tr. pp. 73-74). Appellant thereupon applied to this Honorable Court for an order staying the order of the District Court requiring the filing of a supersedeas bond, and, after argument thereon, on the 9th day of July, 1952, this Honorable Court made its order reading as follows:

"ORDER GRANTING MOTION OF APPELLANT
FOR STAY OF ORDER

"Upon consideration of the motion of appellant for an order staying the order of the United States District Court for the Northern District of California, dated May 14, 1952, requiring appellant to post a supersedeas bond on its appeal herein, and of the opposition thereto, and oral arguments had by counsel for respective parties, and good cause therefor appearing,

"IT IS ORDERED that said motion be, and hereby is granted, and that all further proceedings on said order of May 14, 1952 be, and hereby are stayed pending determination of the appeal herein."

This Court had jurisdiction of the appellant's petition to stay such order for a supersedeas bond under the provisions of the *Federal Rules of Civil Procedure*, Sec. 62(g), which provides:

“(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”

Appellant herein is a Trustee appointed in proceedings pursuant to the *Bankruptcy Act*. By the provisions of Section 25(b) of said Act (11 U.S.C.A. Sec. 48(b)), he is relieved from the necessity of furnishing the supersedeas bond ordered by the lower Court. In said Section it is provided:

“Receivers and trustees shall not be required *in any case* to give bond when they take appeals.”

This Section was in full force and effect at the time the District Court required the giving of a supersedeas bond.

The order of the District Court was apparently based on Rule 73(d) of the *Federal Rules of Civil Procedure* (Tr. p. 57). This rule, however, obviously does not purport to change the *statutory* provision exempting trustees from the necessity of filing a bond. In fact, it is applicable only to those appellants who express a desire for a stay on appeal or who have requested or presented to the Court a supersedeas bond. Nothing in Rule 73(d) gives the Court juris-

diction to *force* an appellant to file a supersedeas bond. Here the Trustee (appellant) did not ask the lower Court for a stay; he therefore could not be compelled by such Court to file such a supersedeas bond. Appellant is relying upon Sec. 25(b) of the *Bankruptcy Act*, quoted above, as exempting him from the necessity of filing any bond in the present case.

We therefore respectfully submit that the order of the District Court requiring such supersedeas bond was error and should be reversed.

III.

The Court Erred in Retaxing Costs Against Appellant

As in the case of Point II hereinabove, if this Court reverses the lower Court on either of the grounds set forth in subdivisions I or II of this Argument, this particular appeal becomes moot.

After entry of the final order requiring the reinstatement of appellees, they filed a memorandum of costs and disbursements aggregating \$207.20 (Tr. pp. 60-63). Attached to such memorandum was a schedule setting forth witness fees and mileage claimed by appellees, aggregating \$199.20. With the exception of the sum of \$16.60, claimed as the fee and mileage for Wesley Cross, all of these fees and mileage were for the attendance of the appellees themselves, to testify in their own behalf. To this memorandum appellant in due course made a motion before the Clerk of the District Court at Sacramento to tax such costs by striking therefrom the item of \$199.20 for witness fees and mileage and the further item of \$4.00 for a transcript of remarks of the Court at the conclusion of the argument, which tran-

script was ordered by the attorney for appellees (Tr. pp. 70-72).

Thereupon, and in due course, the Clerk taxed the costs by disallowing the sum of \$4.00 for the said transcript of remarks and also disallowing the witness fees and mileage on the ground that the witnesses were parties in interest and consequently were not entitled to witness fees or mileage (Tr. pp. 81-82).

Subsequently, appellees moved the District Court (Judge Harris) to retax costs (Tr. pp. 82-84). Thereafter, Judge Harris made an order granting the motion to retax costs (Tr. p. 85). Thereupon, appellant appealed from such order (Tr. p. 86) and filed his statement of points upon which he intends to rely on this appeal (Tr. p. 87).

1. COST OF TRANSCRIPT OF THE REMARKS OF THE COURT.

This item represents the cost of a transcript of certain remarks of the Court ordered, not by the Court, but by counsel for appellees, for his own convenience. It was upon that ground that it was denied by the Clerk of the District Court (Tr. pp. 81-2). We respectfully submit that the denial was proper. See *Pine River Logging & Improvement Co. v. U. S.*, 186 U.S. 279, 46 L.Ed. 1164; *Burnham Chemical Co. v. Borax Consolidated, Ltd.*, 7 F.R.D. 341; *Branfoot v. Hamilton*, 52 Fed. 390; *Stallo v. Wagner*, 245 Fed. 636.

2. WITNESS FEES AND MILEAGE.

With the exception of Wesley Cross, all of the witnesses for whom such fees and charges were claimed were the appellees in this proceeding. They were not subpoenaed by the Trustee and therefore are not entitled to fees or mileage; they were all testifying in their own behalf.

See *Picking v. Penn. R. Co.*, 11 F.R.D. 71, holding that a party is not entitled to witness fees or mileage for his own attendance and in his own behalf. See also:

Re Wahkeena, 51 Fed.(2d) 106;

The Philadelphia, 163 Fed. 438;

Hopkins v. General Electric Etc., 93 F. Supp. 424;

The Petroleum No. 5, 41 Fed.(2d) 268.

CONCLUSION

By reason of all of the foregoing, it is respectfully submitted that each and all of the appeals taken should be ruled upon in favor of appellant, and each of the orders of the District Court from which such appeals are taken should be reversed.

Respectfully submitted,

ORRICK, DAHLQUIST, NEFF & HERRINGTON
STERLING CARR

Attorneys for Appellant

By STERLING CARR

The following is a list of the names of the persons who have been
 appointed to the various offices of the Board of Directors of the
 Bank of the City of New York, for the term ending on the 31st
 day of December, 1885. The names of the persons who have been
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By request of a committee of the Board of Directors of the
 Bank of the City of New York, the following report has been
 prepared, showing the results of the operations of the Bank during
 the year ending on the 31st day of December, 1885. The report
 is divided into two parts, the first of which contains a statement
 of the assets and liabilities of the Bank, and the second of which
 contains a statement of the income and expenses of the Bank.

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No. 13,393

IN THE

United States
Court of Appeals

For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a Corpora-
tion, Debtor,
Appellant,

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT
W. TALLMAN, MILO F. BARNHART, ROLAND
C. ZIMMERMANN, FLOYD C. JACKSON,
GLADYS M. ZIMMERMANN, EDWIN H. JAS-
MANN, FRANK SUTTON, GEORGE F. SCOTT
and JOHN E. VICK,
Appellees.

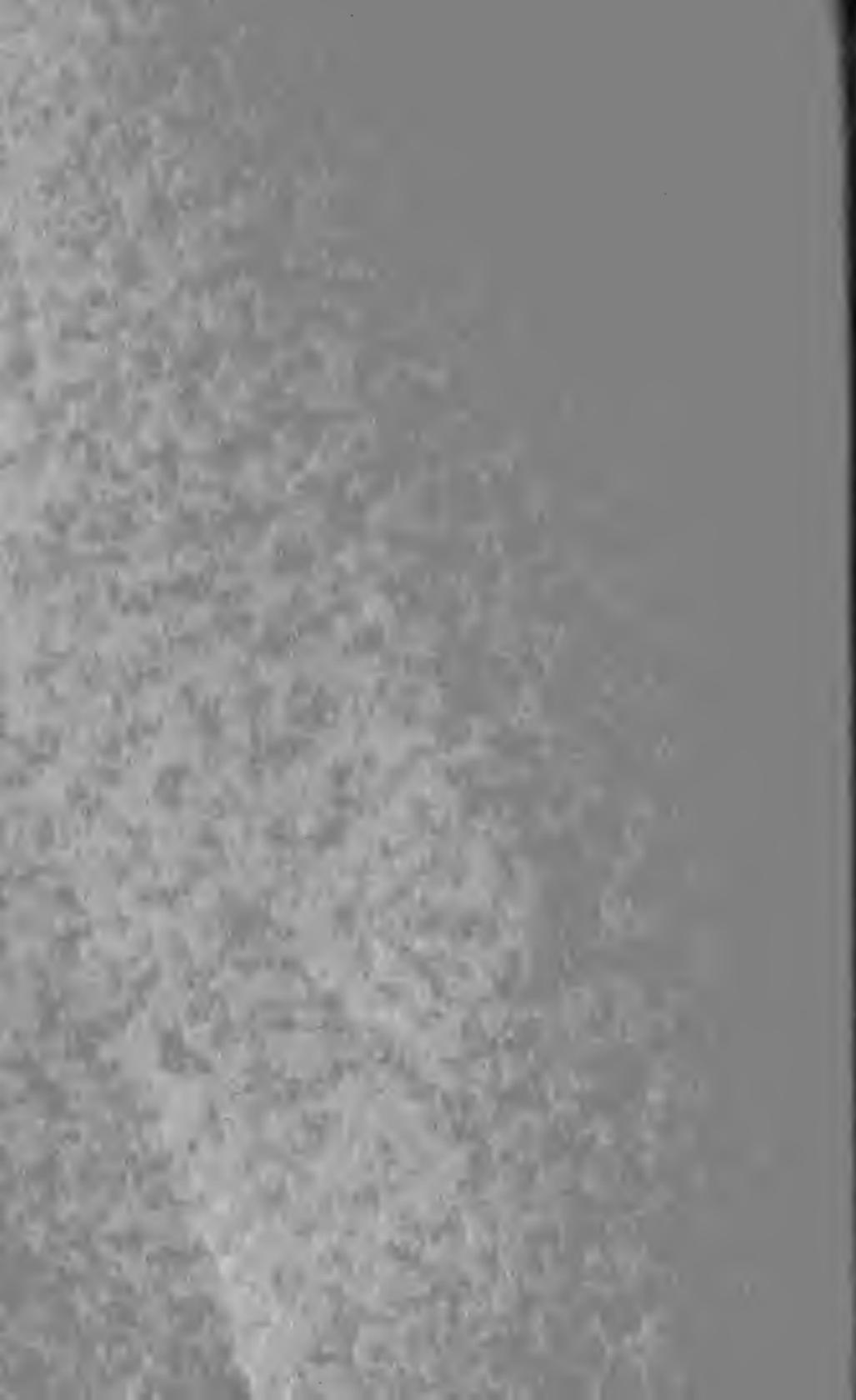
Brief of Appellees

Appeals from the United States District Court,
Northern District of California,
Northern Division

Honorable GEORGE B. HARRIS, Judge Presiding

PEMBROKE GOCHNAUER
111 Sutter Street
San Francisco 4, California

Attorney for Appellees



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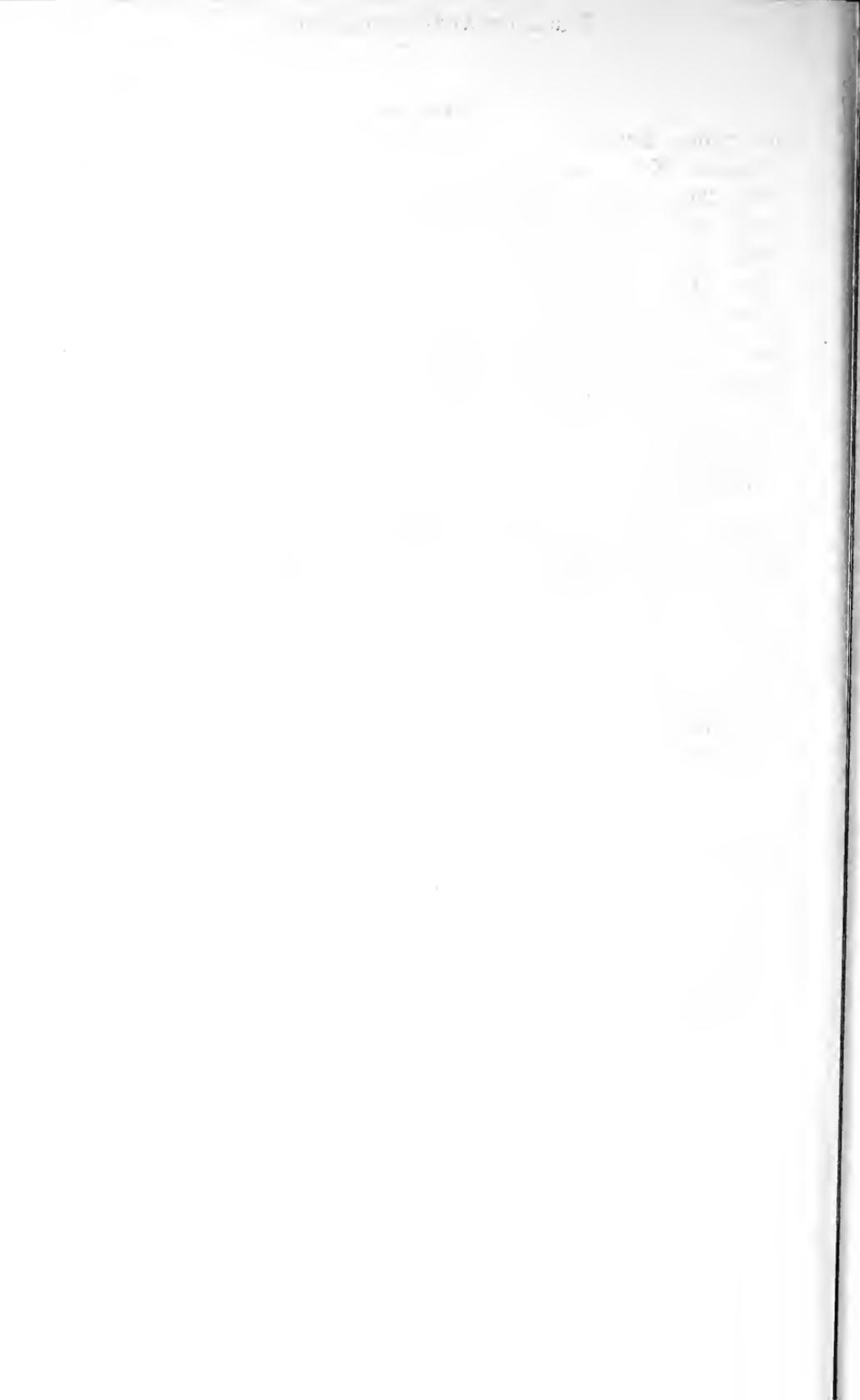
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IN THE
**United States
Court of Appeals**

For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal
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ration, Debtor, *Appellant,*

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT
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GLADYS M. ZIMMERMANN, EDWIN H. JAS-
MANN, FRANK SUTTON, GEORGE F. SCOTT
and JOHN E. VICK, *Appellees.*

Brief of Appellees

Appeals from the United States District Court,
Northern District of California,
Northern Division

Honorable GEORGE B. HARRIS, Judge Presiding

INTRODUCTORY

This case stems from the summary dismissal of eleven employee-stockholders of Coastal Plywood & Timber Company by one Dyke, its manager, with the authorization of Appellant Trustee but without prior authorization by the

bankruptcy court. Pursuant to stipulation by counsel for the Appellees, the Debtor company, and the Appellant Trustee, the district court vacated its general stay order to permit Appellees to file their petition. Appellant filed a motion to dismiss and an answer. Debtor company filed no pleading, but appeared by counsel throughout the trial in support of the Appellees' petition. The trial judge deferred a ruling on Appellant's motion to dismiss until after he had heard the evidence. After a trial lasting five days the court denied the motion to dismiss and entered an Interlocutory Order Reinstating Employees with Back Pay, wherein it ordered that the petitioners (naming them)

"be and they are hereby reinstated in the jobs held by them, respectively, on December 27, 1951, in the Cloverdale plant of the Debtor Coastal Plywood & Timber Company, or restored to substantially equivalent employment by said Debtor at said plant at equivalent rates of pay, pending the further order of this court.

"It is further ORDERED that the Debtor's trustee shall forthwith reimburse each of said petitioners from the Debtor's estate for all wages lost by them, respectively, on and after December 28, 1951, by reason of the lay-off or discharge of said petitioners on or about said date at the rates of pay then being received by them respectively." (Tr., p. 27)

On the following business day, Monday, February 18, 1952, Appellant caused each of the Appellees to be reinstated as an employee, or offered reinstatement as an employee, of the Debtor in conformity with the said Interlocutory Order, but did not and has not paid them the back pay. Appellant has appealed from the Interlocutory Order.

Certain motions were thereafter presented to the trial court and certain orders resulted therefrom, including the order requiring Appellant to file a supersedeas bond, from which an appeal is pending herein. Thereafter, the court, after oral hearings to determine the amounts of back pay to which each of the Appellees was entitled after all proper offsets, entered its Order Reinstating Employees with Back Pay which is the subject of the principal appeal herein.

After the entry of the final order costs were taxed by the clerk and re-taxed by the trial court on motion of Appellees. Appellant has appealed from the order re-taxing costs.

On July 9, 1952, this court granted Appellant's motion for a stay of the order requiring him to file a supersedeas bond whereby he was relieved of compliance with the requirements of that order.

Appellant's Statement of Points upon which he intends to rely on appeal from the interlocutory order assigned the same asserted errors as his Statement of Points on his appeal from the final order, with this exception;—as to the Interlocutory Order, his Statement of Points (Tr., pp. 29-31) filed March 7, 1952, takes no exception to that portion of that order requiring him to reinstate employees in the jobs held by them prior to their discharge, whereas his Statement of Points with respect to the final order (Tr., pp. 79-81) filed June 5, 1952, contains in paragraph number 3 thereof a specific assignment of error as to the reinstatement of Appellees. For reasons more fully discussed hereinafter, we submit that no issue now exists as to that portion of the trial court's orders requiring Appellant to reinstate Appellees in their jobs as employees of Debtor.

STATEMENT OF THE FACTS

The printed record on appeal from the five-day trial is abbreviated. The following facts appear from the findings of the District Court (Tr., pp. 35-53).

The Debtor, Coastal Plywood and Timber Corporation, is a Nevada Corporation with its office and principal place of business at Cloverdale, California. For two or more years each of the Appellees had been the holder of one share of the capital stock of Debtor for which he or she paid the sum of \$2500.00. Prior to December 28, 1951, each Appellee had been regularly and continuously employed by Debtor at Cloverdale, California, for periods of time ranging from two years and four months to five years and three months. Each Appellee, except Scott and Tallman, is a creditor of Debtor in amounts ranging from \$200.00 to \$1650.00 representing money loaned to Debtor. Appellee Norberg is the President and a Director, Appellee Barnhart is the Vice-President and a Director, and Appellee Jackson is a Director of Debtor.

At the time each Appellee purchased his or her share of stock in Debtor Corporation its Articles of Incorporation contained the following provisions:

“Article IX

“In view of the particular nature of this corporation and the contribution to the success thereof expected to ensue from the plan of identifying the management personnel and employees with Class ‘A’ stock ownership, no share of Class ‘A’ stock may be issued except as follows:

“One share of such stock only can be issued to or owned by any stockholder, and such stockholder must be an active employee, or a person acceptable to the

Board of Directors as a future active employee of the Corporation.”

It is further provided that: * * *

* * * * *

“(d) On behalf of the Corporation the Board of Directors shall have the sole and exclusive option to purchase from any holder of Class ‘A’ stock who shall fail to report for work within sixty (60) days after the mailing to him, by registered mail, of written call to report for work, or who shall voluntarily or involuntarily cease to be employed by the Corporation by reason of discharge, retirement, resignation, disability or any other reason whatsoever, the share of stock of such holder at the bona fide market value, as hereinafter defined, for a period of 60 days from such failure to report or such cessation of employment. Notice of the exercise of said option and payment to be accomplished in the manner prescribed in subparagraph (a).

“The specific provisions governing discharge, retirement, or disability shall be set forth in the By-laws.”

The Articles of Debtor have continued to include the foregoing provisions except that the designation of the shares subject thereto as Class “A” Stock has been eliminated and all of its outstanding stock including that held by Appellees is now subject to said provisions.

At the time each Appellee purchased his or her share of stock in Debtor Corporation its by-laws contained provisions relating to the tenure and job security of stockholder employees including the following:

“Section 2. Discharge:

“A Class ‘A’ stockholder employee may not be discharged except with the approval of the majority of the

members of the Board of Directors who are elected by the Class 'A' stockholders. If the Class 'A' stockholder so discharged is unwilling to accept the decision of said Directors, he may request in writing of the President, Vice-President or Secretary, within ten (10) days of such decision, that his discharge be reviewed at a meeting of the Class 'A' stockholders called for the purpose in accordance with the provisions of the By-laws. Unless a majority of the stockholders voting at such meeting approves such discharge, it shall not be effective."

The court below found that the said provisions were intended to afford job security and job tenure to Appellees and to constitute valid and enforceable agreements between Debtor and each Appellee, in reliance upon which each Appellee purchased his stock and accepted employment and has since continued such employment; that prior to purchasing said stock each Appellee was induced to and did move his or her residence to Cloverdale; and that each Appellee, except Tallman and Gladys M. Zimmermann, has purchased or is purchasing a home in Cloverdale in reliance upon continued employment by Debtor.

On September 10, 1950, the By-laws of Debtor were amended by vote of majority of its shareholders to, among other things, eliminate the above-quoted provisions relating to job security and job tenure. At the time of such amendments Debtor was indebted to the Bank of America and the R.F.C. for approximately \$2,600,000 secured by mortgages on its property and assets, and such amendments were unequivocally required by said bank and the R.F.C. as the condition of continuing said loans and future

financing, and were not intended to impair and did not impair the job security and job tenure provisions of the agreements between Debtor and Appellees.

On November 1, 1951, the District Court appointed Fred G. Stevenot Trustee of Debtor. On December 5, 1951, said Stevenot employed Martin Dyke as Manager of Debtor in charge of its Cloverdale plant. Prior to the appointment of the trustee Dyke had been employed as General Manager of Debtor since October, 1949.

On December 20, 1951, said Stevenot filed his sworn report to the court in said proceedings reporting, among other things, that he had retained in the employ of Debtor such employees in addition to Dyke as he, the said Stevenot, determined necessary to continue the profitable operation of its business. At that time all of the petitioners were regularly employed. On December 28, 1951, without any prior notice or warning to petitioners Dyke laid off each of them, and thereafter on or about February 1, 1952, upon service on counsel for the trustee of the petition for reinstatement filed herein, said Dyke finally determined that petitioners were permanently discharged from all further employment by Debtor solely by reason of their having instituted their petition to the Court for redress.

Petitioners were so laid off and discharged without authorization by the court. Said lay-off and discharge was as to each petitioner wholly without cause, sufficient reason or justification in the proper conduct and management of Debtor's business and estate, was arbitrary and capricious, and in violation of their rights, contrary to sound industrial relations practice, and was due solely to the fact that Dyke personally opposed petitioners in the exercise of their statu-

tory rights as shareholders, officers or directors of Debtor Corporation in matters totally unrelated to the proper administration and preservation of Debtor's business and estate by the court's trustee. Reinstatement of petitioners with restitution of earnings lost by reason of such wrongful lay-off and discharge will be for the best interests of the Debtor.

All of the petitioners were reinstated or offered reinstatement on February 18, 1952. The amount of wages lost by petitioners varied from \$350.74 to \$508.60 and aggregated as to all petitioners \$4,887.62 for which amount Appellant was ordered to reimburse them forthwith. No part of such amounts has been paid.

ARGUMENT

The Findings of Fact Are Conclusive.

The findings in the final Order Reinstating Employees with Back Pay (Tr., pp. 35-53) are conclusive as to all facts found therein.

Federal Rules of Civil Procedure, Rule 52(a) provides—"findings of fact shall not be set aside unless clearly erroneous."

In *United States v. Aluminum Co. of America* (1945, C.C.A. 2d), 148 F.2d 416, the court, in applying Rule 52(a), says at page 433:

"However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, one accepted rule is that they 'must be treated as unassailable.'" (citing cases) * * * "Since an appellate court must have some affirmative reason to reverse anything

done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

Applied to this case, this means that the findings below are conclusive as to such issues of fact, as the reasons which led Appellees to become stockholder-employees, the intent and purpose of Dyke in discharging them, the reasons for such action, and the effect of such action upon the proper administration of Debtor's affairs in these reorganization proceedings.

The Court in These Reorganization Proceedings Had the Power and Duty to Order Appellant Trustee to Correct His Improper and Unauthorized Action.

The Appellees petitioned the Bankruptcy Court for reinstatement with back pay on the premise that their discharge without proper cause was a breach of and violation of their contracts of employment as contained in the Articles and By-laws of Debtor Company at the time they purchased their stock and became employees; and that the subsequent amendment of the By-laws, whereby the applicable provisions were changed was not intended to abrogate or impair their rights to job security and job tenure, and could not, on constitutional grounds, be so applied. The court heard evidence on the issue and found the "agreements con-

stituted by the Debtor's articles of incorporation and by-laws as they existed at the time petitioners purchased their said stock were not impaired or abrogated in any respect by said amendments" (Tr., p. 48).

At the trial it also appeared from the records in these Chapter X proceedings—(1) that the order appointing Appellant as trustee contains specific limitations upon his authority, namely, that he "perform all things that he shall be directed by the court or judge to do," and that the exercise of his power be "subject always to the direction and control of the judge" (Tr., p. 4); that on or about December 20, 1951, Appellant had filed a sworn report to the court in which he had reported that he had retained in the employ of Debtor company such employees as he determined necessary to continue the profitable operation of the business of said company (Tr., p. 50). As to the discharge of Appellees on December 28, 1951, the court found—"no application was made to the Court for specific authority to lay off or discharge petitioners, or any of them, and they were so laid off and discharged without specific authorization by the Court" (Tr., p. 51).

The court was thus confronted with a new issue, namely, regardless of whether Appellees had enforceable rights as employees or stockholders of Debtor, *was the unauthorized discharge of eleven employee-stockholders, including the president, the vice-president, and three directors of Debtor, without cause and contrary to sound industrial relations practice, and subjecting them to loss of their stock during the reorganization proceedings, beneficial or harmful to the proper administration by the court of the business of Debtor company?* The court specifically found against Appellant and in favor of Appellees on this issue (Tr., pp. 51, 52).

When it appeared from the evidence presented that the discharge of the Appellees had not been authorized by the court we asserted there, as we do here, that the court had the power and was under the duty to refuse to approve such action and to order Appellant, as its appointed officer, to reinstate employees forthwith and to make them whole for wages lost by reason of his unauthorized and improper action.

A trustee in reorganization proceedings is an officer of the court, under its control, and in important matters he can act only with the approval of the court.

Section 102 of the Bankruptcy Act (11 U.S.C.A. Sec. 502) provides in effect that the provisions of other Chapters of the Act apply to proceedings under Chapter X insofar as they are not inconsistent with or in conflict with provisions of Chapter X. Since no definition of "officer" appears in Chapter X, a trustee in a Chapter X proceeding is an officer of the court by the definition of that term contained in Section 1(22) of the Bankruptcy Act (11 U.S.C.A. Sec. 1(22)) wherein a trustee is classified with the clerk, marshal, receiver, custodian, and referee as an officer.

The extent of the court's control over its appointed trustee has been discussed in a number of cases. In the early case of *In re Howard* (1904, D.C. N.D. Cal.) 130 Fed. 1004, a bankruptcy court, in a summary proceeding, ordered its trustee to pay over money to petitioner, saying at page 1006:

"The trustee is an officer of the court and as such is subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office." (The *Howard* case was affirmed on appeal (C.C.A. 9th) 135 Fed. 721).

In *Pearson v. Higgins* (1929 C.C.A. 9th), 34 F.2d 27, the court said, at page 29: "The trustee is an officer of the court, as fully under its control as would be a receiver."

In *Imperial Assurance Co. v. Livingston* (1931 C.C.A. 8th), 49 F.2d 745, the court said, at page 748:

"* * * the trustee can, in important matters, act only with the approval of the court and he must keep the court fully and frequently advised of his action as trustee * * * all of this is because of and emphasizes the fact that he is, an officer of the court."

And again, at page 749

"This situation, as an officer of the court administering property in the custody of the court, is the woof, into which all of his status, duties and powers are woven."

Although the *Imperial* case involved an ordinary bankruptcy proceeding, it was cited with approval in *Western Pacific R. Corporation v. Baldwin* (1937 C.C.A. 8th), 89 F.2d 269, which involved a reorganization proceeding under Section 77 of the Bankruptcy Act. In this case a question arose as to whether a voting trust agreement had been extended. The extension had been requested by one of the trustees but without the authority of the court appointing him. The request was held ineffective unless and until authorized by the court. In so holding the court pointed out that the trustees were officers of the court which had appointed them and were subject to its control, citing the *Howard* and *Imperial* cases, *supra*. The trial court was directed to determine whether or not such unauthorized action by a trustee should be ratified. The court stated in this connection (p. 273):

“We think that the question whether the act of Mr. Baldwin in requesting an extension of the voting trust agreement should be ratified by the court and the voting trust agreement extended is still open for determination, and that the court below, after notice to all interested parties, should determine that question, the answer to which will depend, of course, upon whether or not it is for the best interests of the trust estate, and of the creditors and stockholders interested therein, that the voting trust continue.”

The court below found (Tr., p. 52), and its finding is conclusive, that *the reinstatement of Appellees with restitution of the earnings lost by them by reason of the wrongful lay-off and discharge will be for the best interests of the Debtor.*

In *Freeman Coal Mining Corporation v. Burton* (1944 Ill.), 58 N.E.2d 589, the Supreme Court of Illinois had before it a question of whether a trustee's action in former proceedings for the reorganization of a corporation under Section 77B of the Bankruptcy Act, precluded establishment of a constructive trust in certain property alleged to belong to the Plaintiff. Plaintiff corporation was the successor to the corporation which had gone through reorganization and had received from the trustee the assets of debtor. Later it was discovered that the president of debtor, who was kept as an assistant to the trustee after his appointment, had represented to the trustee that he was the owner of the lands in question and, as a landlord was entitled to certain royalties therefrom. He misrepresented his title, for in fact the lands belonged to the Debtor Corporation. The trustee, believing this representation, paid the royalties and did not dispute the title to the land. Defendant argued that plaintiff as successor to the rights of trus-

tee was estopped to assert title to the lands in question. The court brushed aside this argument with the statement that the trustee was without power to create an estoppel against a bankruptcy estate or its successor in interest, *in the absence of an order of the court authorizing such action*. The court observed that the trustee was an officer of the court as fully under its control as would be a receiver, citing the *Imperial case, supra*.

The foregoing authorities clearly show that a trustee is an officer of the court appointing him; that he can act in important matters only with the approval of the court; and that his unauthorized actions are not binding either upon the court or upon third parties affected thereby.

Applied to the present case, it can scarcely be contended that the unauthorized action of the trustee in permitting Dyke to discharge 11 stockholder employees including the President, the Vice-President and 3 Directors of Debtor Corporation, 9 of whom were also creditors of Debtor, and thereby subjecting them to loss of their stock during the reorganization proceedings, was not an action in an important matter, nor that the court which had appointed the trustee did not have the *power* to rescind such action. The action of the Trial Court in rescinding such action is assigned as error in Appellant's Statements of Points on Appeal (Tr., pp. 31, 81, Opening Brief, p. 9) in that the court substituted its judgment for that of the trustee. Appellant's Opening Brief does not question the court's authority to do so, nor does it contain any discussion of the alleged error. We think the answer to a contention that a bankruptcy court erred in substituting its judgment for that of its appointed trustee is to be found in the axiom—"A stream cannot rise higher than its source."

Reinstatement with back pay is the statutory remedy for discriminatory discharges. *National Labor Relations Act, Sec. 10c* (29 U.S.C.A., Sec. 160(c)).

It is the usual remedy granted under implied powers conferred by the *Railway Labor Act* (45 U.S.C.A., Sec. 151 et seq.); and back pay is awarded by courts as damages for breach of employment contracts.

Moore v. Illinois Central R. Co. (1940), 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089;

Broady v. Illinois Central R. Co. (1951, C.C.A. 7th), 191 F.2d 73;

Roberts v. Western Pac. R. R. Co. (1951), 104 C.A.2d 816.

We think this court may take judicial notice of the fact that reinstatement with back pay is the usual and customary form of redress for wrongful discharge applied by courts, administrative agencies, arbitrators and general industrial relations practice.

The Interlocutory and Final Orders of the trial court constituted a lawful and proper exercise of his authority over Appellant trustee as an officer of the court. We respectfully submit that, upon this ground alone, the principal appeals herein must be dismissed.

The Court Properly Found That Subsequent Amendments to the By-laws Did Not Abrogate Nor Impair the Job Security and Job Tenure Provisions of Appellees' Contracts with Debtor.

Appellant concedes that the contract between Debtor and Appellees contained in the by-laws at the time they became stockholder-employees was not "complied with in the present case" (Op. Br., p. 12). He contends, however, that

their petition "ignores" the fact that the by-laws were amended on September 10, 1950 to eliminate the job security and job tenure provisions; and further, that since such amendment he is unable "to perceive how Appellees can claim any rights whatsoever" (Op. Br., p. 13). The answer is, far from ignoring the amendment of September 10, 1950, Appellees set it up in their petition (Tr., p. 17); and contended, as the court found, that said amendment was not intended to impair or abrogate and did not impair nor abrogate the agreements between Appellees and Debtor Corporation.

Said amendment was adopted by a *majority* vote of the stockholders (Tr., p. 145). Appellant does not contend that any of the Appellees *voted for* the amendment. It cannot be assumed, therefore, that the amendment of September 10, 1950, was assented to by any of the Appellees.

Provisions in corporate by-laws may be divided, generally speaking, into two classes: (a) those that are merely regulations governing the conduct of the internal affairs of the corporation which may be repealed, altered or amended by majority or other vote as specified by the by-laws themselves or by statute, and (b) provisions which create vested or contract rights which cannot be repealed or changed without the consent of the shareholders whose rights are affected.

Bornstein v. District Grand Lodge No. 4 (1906), 2 C.A. 624;

Schack v. Supreme Lodge (1908), 9 C.A. 584;

State v. San Francisco Savings and Loan Soc. (1924), 66 C.A. 53;

Bechtold v. Coleman Realty Co. (1951), 79 A.2d 661;

8 *Fletcher, Cyclopedia of Corporations* (permanent edition), Sec. 4177.

The court found in effect that the discharge provisions in the by-laws of Debtor fall within class (b) above.

While none of the foregoing cases dealt with an alteration or change of corporate by-laws pertaining to employee relations of stockholder-employees, the *Bornstein* and *Schack* cases, *supra*, dealt with the rights of members of mutual benefit corporations. In both cases, by-laws with respect to insurance benefits had been altered materially without the consent of the members although such changes appeared to have been adopted by a majority of the members in accordance with corporate charters or by-laws. In each case it was held the amendments were ineffective to abrogate or impair the contract rights of a member without his consent.

In the *Bechtold* case, *supra*, it was held that a corporate by-law providing that none of its stock should be sold or transferred by any stockholder to any person not already a stockholder until optioned to the corporation or the other stockholders in proportion to their stockholdings, was a contract designed to vest a property right among the stockholders *inter se* which could not be changed without the consent of minority stockholders.

Here, as in the *Bechtold* case, the by-law provisions in question were clearly intended to create vested rights among stockholder-employees which could not be changed without their consent. Moreover an analogy between Debtor and mutual benefit corporations exists. Debtor Corporation attempted to assure job security benefits to its stockholder-

employees to the mutual benefit of the corporation and such stockholder-employees. This fundamental purpose is found in Article IX of its articles (Tr., p. 36-41), which have not been changed since Appellees became stockholder-employees. The by-law provisions in question constituted a further implementation of this general plan.

We submit that said by-law provisions constituted vested rights *inter se* among the stockholder-employees of Debtor which could not be eliminated without their consent, even had it been the purpose of the amendment so to do.

The burden of proving that Appellees consented to the elimination of their job security rights rested in Appellant.

Johnson v. Grand Fountain of United Order of True Reformers (1904), 47 S.E. 463;
8 *Fletcher*, Sec. 4188, p. 720.

ANALYSIS OF APPELLANT'S OPENING BRIEF

Appellant argues only three points with respect to the interlocutory and final orders reinstating Appellees with back pay, which may be summarized as follows: (1) Appellees, at the time of discharge, had no contractual rights because the by-law provisions which gave them job security and were in effect when they purchased their stock and became employees had been eliminated, (2) Appellees failed to comply with "their contracts" by executing option agreements on their stock prior to their discharge (as employees) and may not complain of a *subsequent* breach, and (3) Appellees' petition is an attempt to specifically enforce personal service contracts.

In view of the preceding discussion of the amendment to Debtor by-laws, we see no need to discuss further the Appellant's first contention. We will proceed to the others.

There Was No Issue Before the Trial Court as to Antecedent Breach of Contract by Appellees.

Having first argued that Appellees had no contract with Debtor at the time they were discharged, Appellant next contends that Appellees "had failed to comply with their contracts" and may not complain of a subsequent breach by Debtor (Op. Br., p. 21). The latter contention—that Appellees breached their contract—is wholly inconsistent with and opposed to the former—that Appellees had no contract—and is an about face from Appellant's position before the Trial Court.

Appellees alleged in their petition (Tr., pp. 10-18) that the job security and job tenure provisions of Debtor's Articles and By-laws constituted valid and binding agreements between Debtor and each of them and that the lay-off or discharge of Appellees constituted a breach of said agreements. Appellant's answer (Tr., p. 21) specifically denied "each and every one" of these allegations.

Appellees further alleged on information and belief (Tr., pp. 14-15) specific reasons for their lay-off or discharge by Dyke including as one of such reasons the fact that they had executed option agreements on their stock to one Hampton and that the execution of said option agreements was opposed by Dyke (Tr., p. 14). Appellant's answer denied this allegation on information and belief (Tr., p. 21) and further denied (Tr., pp. 21-22) that Appellees were discharged "for any or all" of the reasons specified.

Thus no issue as to antecedent breach of contract by the execution of the option agreements was presented by the pleadings. The findings in the final order contained nothing about it. Appellant filed (but has not included in the printed

record) proposed amendments to such findings, which amendments contained nothing with respect to such options. The fact is Appellant maintained throughout the trial that Appellees had no contract.

It appeared from Debtor's Exhibit G, which Appellant has included in the presented record (Tr., pp. 115-140) that a suit involving the validity and effect of the option agreements executed by Appellees and others was filed in the State Court on August 27, 1951—prior to the time these re-organization proceedings were commenced. Appellant was free to raise before the Trial Court a defence of antecedent breach of contract had he been so advised. Instead he took an exactly opposite position. He cannot now present the issue for the first time and contend that the Trial Court committed error as to an issue which was not before it.

We assume the issue of antecedent breach was not raised at the trial for any or all of several reasons, viz.: (1) The option agreements, under the circumstances of their execution, did not violate Appellees' agreement with Debtor. (2) The inconsistency of such a contention with Appellant's theory that Appellees had no contractual or other rights as employees which prevented him from discharging them. (3) The execution of the option agreements was not the real reason for the discharges, or even if it were, Appellant was loath to shock the conscience of the court by contending that the signing of options on their stock was a proper ground for discharging Appellees as employees of Debtor.

SPECIFIC PERFORMANCE

The Appellant contends here, as in the trial court, that in petitioning for reinstatement of these employees we were seeking specific performance of contracts for personal serv-

ices in contravention of Sec. 3390(2) of the California Civil Code.

There are several reasons why this contention is not and was not valid:

1. The Issue as to Reinstatement Is Now Moot.

The record shows that "all of the petitioners were reinstated as employees of the Debtor company, or offered reinstatement as employees of the Debtor company, on February 18, 1952" (Findings, Tr., p. 52); and that such action "will have no adverse or harmful effect whatever upon the proper administration and preservation of the Debtor's business and estate by the Court's trustee, but on the contrary such reinstatement with restitution of the earnings lost by petitioners by reason of said wrongful lay-off and discharge will be for the best interests of the Debtor company" (Findings, Tr., p. 52).

In the face of this record, no issue now exists either as to whether the trial court had the power to order, or in the proper exercise of its powers ought to order, such reinstatement. It is well settled that a reviewing court will not pass upon an issue which, for any cause, has become moot. A statement of this rule which is often quoted is that contained in the opinion of Judge Van Fleet in *Southern Pacific Co. v. Eshelman* (N.D. Cal., 1914), 227 Fed. 928, at p. 932:

"To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although a case may have presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court,

upon the fact appearing, to dismiss it." (Citing several decisions of the United States Supreme Court)

See also 1 C.J.S. 1017, which is quoted in

People v. Collins (1950), 97 C.A.2d 552, at p. 554;
Weber v. Nasser (1930), 210 Cal. 607.

Nor does the operation of this rule impose any hardship on appellant. These appellees had been discharged "wholly without cause" (Findings, Tr., p. 51) and "said lay-off and discharge was arbitrary and capricious as to each and all of said petitioners and was in violation of their rights and contrary to sound industrial relations practice * * *" (Findings, Tr., p. 51); and this case does not directly, nor even remotely, involve any issue as to the present or future rights of Appellant to discharge or otherwise discipline these employees *for cause*.

The issue as to reinstatement which was presented to the trial court has since been wholly removed from the case and any order of this court with respect to such issue would be futile.

2. This Was Not an Action for Specific Performance Within the Scope of Section 3390 of the California Civil Code.

We do not question the application of the rule expressed in Sec. 3390 to any situation in which the reasons for that rule, as stated in *Poultry Producers, etc. v. Barlow* (1922), 189 Cal. 278, 288, and quoted at p. 22 of Appellant's brief, apply. None of these reasons (involuntary servitude, public policy and impossibility of enforcing compliance) apply to the situation presented in this case. This was not a suit for specific performance or for an injunction. It was a petition to the bankruptcy court in the reorganization proceedings

for an order directing its trustee to correct an action authorized by him but without authorization by the court, by reinstating these employees and paying them wages lost by reason of such action. The bankruptcy court was confronted with no problem as to involuntary servitude, public policy, or impossibility of enforcing compliance with its order.

It is now well settled that specific performance, or the correlative suit for an injunction, is a proper remedy for the breach of a collective bargaining agreement.

See No. 156 *A.L.R.* 652, 662;

Montaldo v. Hires' Bottling Co. (1943), 59 C.A.2d, 642;

California Labor Code, Sec. 1126 (Adopted 1941);

National Labor Relations Act, Sec. 10(c) (Adopted 1935).

Prior to the adoption of the California statute in 1941, the rule had been applied by California courts. One of the first cases was called to our attention at the trial by the learned trial judge, who had participated in it as counsel for the employers involved. This was the celebrated case of *Weber v. Nasser, supra*, which involved a suit by a labor union to enforce by injunction the provisions of a collective bargaining agreement. The trial court sustained a general demurrer to the complaint and dismissed the action on the ground that the agreement involved personal services and was not subject to specific enforcement. On appeal the district court of appeal reversed (286 Pac. 1074) and subsequently the Supreme Court, without discussing the issue, dismissed the action on the ground that the issues had become moot by prior expiration of the collective bargaining

agreement. While the action of the Supreme Court had the effect of nullifying the decision by the District Court of Appeal, it is significant that as early as 1930 a California appellate court had established the right to specific performance of a collective bargaining agreement.

Again, in 1940, a year before the California statute, an injunction was issued against breach of a collective bargaining agreement. *Shop 'N Save v. Retail Food Clerks' Union*, (Cal. Super. Ct. 1940), 2 *Labor Cas*, 18,673.

In 1941 the California Legislature set the matter at rest by the passage of Section 1126 of the *Labor Code* reading as follows:

“Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State.”

We concede that the agreement between Debtor and its stockholder-employees does not meet the exact terms of the above definition of a “collective bargaining agreement” because there was no union or “labor organization” involved, but we do contend that the agreement here otherwise is comparable to a collective bargaining agreement. It applied uniformly to all stockholder employees. It was an agreement mutually beneficial to Debtor and such stockholder employees. It covered not only job security and tenure but also wage rates, vacations, retirement and leaves of absence (Tr., pp. 42-46), all of which are commonly embraced in collective bargaining agreements. Therefore it is difficult to

imagine any justification for the application of Section 3390 of the California Civil Code to the agreement here involved when such provision is inapplicable both by statute and judicial interpretation to collective bargaining agreements.

3. The Articles of Incorporation of Debtor Provided for Disposition of Appellees' Stock Upon Their Discharge as Employees, and the Court Had Power to Protect Their Rights as Stockholders.

Apart from their position as employees or officers or creditors of Debtor, Appellees were stockholders of Debtor corporation. Article IX in its Articles of Incorporation (quoted in the findings, Tr., pp. 36-41) provided for the disposition and pricing of the share of any holder "who shall voluntarily or involuntarily cease to be employed by the corporation by reason of discharge—." Shareholders, of course, have rights in proceedings for the reorganization of a corporation under Chapter X. Certainly their rights as shareholders are the special concern of the Bankruptcy Court. It can hardly be contended that the court had no power to protect Appellees against loss of their stock during reorganization proceedings by unauthorized action discharging them as employees.

SUPERSEDEAS BOND

When Appellant failed to comply with the provision of the Interlocutory Order requiring him "forthwith" to reimburse the Appellees from Debtor's estate for their lost wages, they moved for an order requiring him to file a supersedeas bond as required in Rule 73d of the Federal Rules of Civil Procedure (Tr., pp. 31-34), citing in support

of their motion the decision of this court in *Pacific Coast Casualty Co. v. Harvey* (1918, C.C.A. 9th), 250 Fed. 952. The Trial Court, after a hearing in which it determined the amount of wages lost less all proper offset, and prior to the entry of its final order, ordered Appellant to file a supersedeas bond in the amount of \$10,000. Appellant petitioned this court for a stay of that order. A stay was granted on July 9, 1952. Appellant's contention is that Section 25(b) of the Bankruptcy Act (11 U.S.C.A. Sec. 48b) relieves him from the necessity of furnishing a supersedeas bond. This court had the provision before it as it then read in the *Harvey* case, *supra*, and held that the exemption of trustees applied to cost bonds only and did not relieve a trustee in bankruptcy from the obligation to post a supersedeas bond. At the time of the *Harvey* decision the provision was contained in Section 25(e) of the Bankruptcy Act, and read—

“Trustees shall not be required to give bond when they take appeals or sue out writs of error.”

Now the provision is contained in Section 25(b) of said Act and reads

“Receivers and trustees shall not be required in any case to give bond when they take appeals.”

Appellant appears to contend that the amendment has changed the rule announced in the *Harvey* case. We most strongly maintain that this is not true; and that the Trial Court properly ordered Appellant to give a supersedeas bond to protect Appellees pending the outcome of this appeal against ultimate loss of their wages.

The question of whether trustees in bankruptcy are required like other litigants to file supersedeas bonds when

they take appeals is a point which will seldom arise for the reason that a trustee usually complies with the orders of the court appointing him, particularly those dealing with administrative expense in the reorganization proceedings. However, since the purpose of such a bond in this case—protection of Appellees pending this court's decision—will have passed when this court decides this case, this court may if it chooses refuse to rule further upon the point.

At this late stage of this case it seems unnecessary to argue the point further than to point out to this court that the interim order of the trial judge was, in our opinion, correct and in conformity with the rule established by this court in the *Harvey* case, *supra*.

THE ORDER RETAXING COSTS WAS WITHIN THE DISCRETIONARY POWERS OF THE COURT IN SUCH MATTERS AND WAS ENTIRELY CORRECT AS TO EACH ITEM.

Appellees filed a cost bill aggregating \$207.20. The clerk sustained Appellant's objection to the principal items and taxed costs in the total sum of \$4.00. On motion, the trial court, after a hearing (Tr., pp. 89-105), retaxed costs in the amount of the cost bill as filed.

Appellant urges here, as in the court below, that two items should have been disallowed. One item was "reporters fees—Transcript of the Remarks of the Court at Conclusion of Argument, Friday, February 15, 1952—\$4.00," and the other was "witness fees and mileage—\$199.20." As to the latter item Appellant now apparently concedes a sum of \$16.60 was proper (Op. Br., p. 27) so that the present objection applies to the sum of \$182.60 representing witness fees and mileage for the eleven Appellees in attending a supplementary court hearing on May 1, 1952.

Before examining these items we wish to point out that the Appellant's contention is "the District Court erred" (Tr., p. 27) and not that the allowance of these items constituted an abuse of the District Court's discretion. There is of course a distinction between error and an abuse of discretion. See 1 *C.J.S.* 402, et seq.

Taxable costs are fixed by the *Judicial Code* (28 U.S.C.A. Sec. 1920) and the matter of assessing costs is within the discretion of the District Court.

United States v. One 1949 GMC Truck (1950 D.C. Va.), 104 Fed. Supp. 34;
Spiritwood Grain Co. v. Northern Pacific Ry. Co.
 (1950 C.C.A. 8th), 179 F.2d 338.

The first item represents the cost of transcribing the statement of the trial judge at the conclusion of the trial in which he announced his oral findings of fact and requested Appellees' attorney to prepare proposed written findings of fact. It was obtained by the attorney for Appellees to enable him to prepare the written findings in accordance with the court's oral statement. It was "necessarily obtained for use in the case" within the meaning of the statute cited next below.

By the amendments to the *Judicial Code adopted in 1948* a district court is expressly vested with discretionary power to tax as costs

"Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." (28 U.S.C.A. Sec. 1920(2))

As we pointed out to the court below (Tr., p. 100) the cases cited on page 28 of Appellant's Opening Brief, and

in the Trial Court, arose under the different provisions of the earlier statutes. Any value they once had as precedent has been washed away by the new statute.

The next item covers witness fees and mileage from Cloverdale, California, to San Francisco of twelve witnesses. One of these, Wesley Cross, who was a foreman in Debtor's plant, covered his appearance under subpoena at the trial in February. Appellant apparently now concedes, as he must, that the allowance of this item was proper. Appellant objects to the court's allowance of the other witness fees and mileage on the ground that the witnesses, (1) were not subpoenaed by the trustee and (2) "they were all testifying in their own behalf."

Appellant's first point—that the witnesses appeared voluntarily and without subpoena—is entirely without merit. Witness fees are properly taxed as costs where the witnesses appeared voluntarily and without subpoena.

The Petroleum No. 5 (1930 D.C. Tex.), 41 F.2d 268;
Spiritwood Grain Co. v. Northern Pacific Ry. Co.
supra.

Nor does the contention that this item represents fees and mileage to witnesses testifying in their own behalf correctly present the picture. No costs were claimed for the appearance of the eleven Appellees during the trial. The item covers their appearance on May 1, 1952, in a supplementary proceeding. Before it could enter its final judgment the court necessarily was required to determine the amounts of wages lost by each Appellee from the date of discharge, December 28, 1951, to the date of their reinstatement, February 18, 1952, less any proper offset for wages earned

elsewhere during such period. The court was further required before entry of the judgment to pass upon Appellant's contention as to mitigation of actual loss of earnings. This was necessary in order to determine the proper amount of the final judgment to be entered in favor of each Appellee. At the commencement of the hearing on May 1, 1952, George Herrington, Esq., one of the attorneys for Appellant, announced in open court that Appellant was then ready to stipulate to the amounts of wages lost by each Appellee less all proper offset. This stipulation was accepted. Mr. Herrington then proceeded to call each of the eleven Appellees to the witness stand *as a witness for Appellant* and examine each of them with respect to his efforts to obtain other employment during the period in which he was discharged from Debtor's plant, in an effort to establish mitigation or lessening of the amounts to which each Appellee was entitled. (The foregoing statement of facts substantially appears from the transcript of the hearing on the motion of retax costs contained in pages 89-105 of the Printed Record filed herein). It is thus clear that Appellees were allowed witness fees and mileage while testifying as witnesses for Appellant and against their own interests.

We have no quarrel with the general rule stated in the cases cited at page 29 of Appellant's Opening Brief. A party litigant is not ordinarily permitted to claim witness fees and mileage for appearance at a trial of his case. This rule is based upon the fact that the litigant is appearing in his own interest and because of his interest in the management of his case. In one of the cases cited by Appellant, *The Petroleum Number 5, Supra*—a litigant was allowed a witness fee under the facts there presented.

Under the new statute (28 U.S.C.A. Sec. 1920 (3)) the allowance of these witness fees and mileage was within the sound discretion of the Trial Court and can be reversed here only upon a showing of an abuse of discretion.

*Spiritwood Grain Co. v. Northern Pacific Ry. Co.,
supra.*

Even prior to the new statute this court held in *Kirby v. United States* (1921 C.C.A. 9th), 273 Fed. 391 that the Trial Court committed no abuse of discretion in taxing as costs mileage and fees of witnesses who did not testify.

Since the item covers fees and mileage of Appellees while testifying in a supplementary proceeding as witnesses for Appellant and against their own interests the allowance of witness fees and mileage to them was entirely proper and under no circumstances could it be an abuse of the discretion vested in the Trial Court.

SUMMARY

The four appeals herein should be dismissed for the following reasons:

1. The findings of the District Court are conclusive as to the facts stated therein.
2. A District Court in proceedings for the reorganization of a corporation under Chapter X of the Bankruptcy Act has general control over the administration of the affairs of a debtor and after hearing all interested parties it may refuse to approve an unauthorized action by its appointed trustee.
3. The District Court properly found that the discharge of Appellees was without proper cause and in violation of

their rights and its order reinstating them with restitution of lost wages constituted the proper form of redress.

4. This Court will refuse to consider any issue which was not presented to the District Court.

5. No issue now exists as to the reinstatement of Appellees pursuant to the Interlocutory Order.

6. The case presents no issue as to specific performance of personal service contracts.

7. A supersedeas bond is of no use at this stage of the proceedings.

8. The order retaxing costs was within the discretion of the District Court and was entirely correct.

Respectfully submitted,

PEMBROKE GOCHNAUER

Attorney for Appellees

IN THE

United States
Court of Appeals

For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a Corpora-
tion, Debtor,
Appellant,

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT
W. TALLMAN, MILO F. BARNHART, ROLAND
C. ZIMMERMANN, FLOYD C. JACKSON,
GLADYS M. ZIMMERMANN, EDWIN H. JAS-
MANN, FRANK SUTTON, GEORGE F. SCOTT
and JOHN E. VICK,
Appellees.

Reply Brief of Appellant

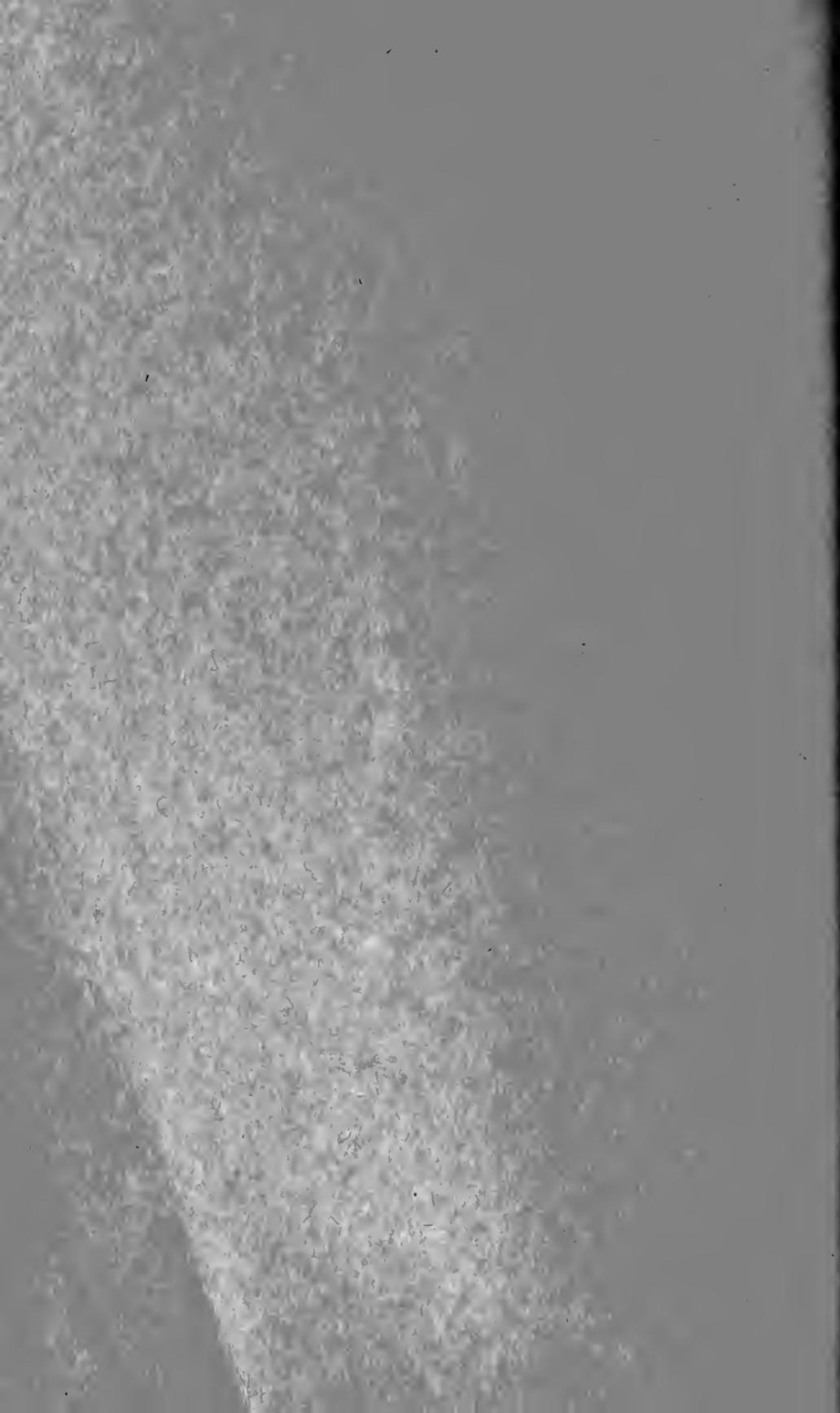
Appeals from the United States District Court,
Northern District of California,
Northern Division

Honorable GEORGE B. HARRIS, Judge Presiding

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IN THE

United States
Court of Appeals

For the Ninth Circuit

FRED G. STEVENOT, Trustee of Coastal
Plywood & Timber Company, a Corpo-
ration, Debtor, *Appellant,*

vs.

J. W. NORBERG, NILS G. MATSON, MERRITT
W. TALLMAN, MILO F. BARNHART, ROLAND
C. ZIMMERMANN, FLOYD C. JACKSON,
GLADYS M. ZIMMERMANN, EDWIN H. JAS-
MANN, FRANK SUTTON, GEORGE F. SCOTT
and JOHN E. VICK, *Appellees.*

Reply Brief of Appellant

Appeals from the United States District Court,
Northern District of California,
Northern Division

Honorable GEORGE B. HARRIS, Judge Presiding

INTRODUCTION

This appeal involves two primary issues, viz.:

- (1) Did the District Court err in ordering appellant to reinstate appellees as employees of Coastal Plywood & Timber Company (hereinafter called the "Debtor") following their discharge by appellant; and

(2) Did the District Court err in ordering that appellees be reimbursed for wages lost by them during the period of such discharge.

In addition, error is assigned to an order of the District Court directing appellant to file a supersedeas bond and to a further order re-taxing costs.

The primary issues noted above are distinct and separate and should be so regarded in appraising the arguments advanced by appellees to sustain the ruling of the District Court. In this connection, appellees contend that the first of said issues is moot. We shall consider this contention before proceeding to the basic legal questions presented. Before doing so, however, we desire to call to the attention of Your Honors that counsel in his Brief attempts to create the belief that this involves a labor relation contract covered by the California Labor Code or the National Labor Relations Act. Such is not the fact for neither the California Code nor the National Act is involved herein in any respect. This is conclusively shown by the Petition of appellees (Tr. pp. 10-18), filed herein and in which they make no reference to such Code or Act but rely solely and wholly on an alleged contract with Debtor. Appellees are not and never have been under the National Labor Relations Act and the references of counsel thereto as well as the statements of the lower Court that the discharge of appellees was "contrary to sound industrial relations practice" have no bearing whatsoever upon the present issue, based as it is upon a straight breach of contract action. Moreover, the United States Supreme Court has twice held directly that even employees covered by the National Labor Relations Act must keep and live up to their contracts. See—*National Labor*

Relations Board v. Sands, 306 U.S. 332; 59 S.Ct. 508, cited at pages 19 and 21 of our Opening Brief. Also see—*N.L.R.B. v. Fansteel, etc.*, 306 U.S. 240; 59 S.Ct. 409.

ARGUMENT

I.

The Issue as to Reinstatement Is Not Moot

In the Brief of Appellees (p. 3) it is asserted that appellant, in his Statement of Points, takes no exception to that portion of the Interlocutory Order of the District Court requiring appellant to reinstate appellees in the jobs held by them prior to their discharge. Subsequently in the Brief of Appellees (pp. 21-22), it is contended that the issue as to reinstatement is now moot. Apparently, it is the contention of appellees that, because they have been reinstated as employees of the Debtor, as directed by the Order of the District Court, no issue now exists as to whether said Order was proper.

In so contending appellees ignore the first, third, fourth, fifth, sixth and seventh points included in the Statement of Points Upon Which Appellant Intends to Rely on Appeal from said Interlocutory Order (Tr., pp. 29-31). These points assert, in substance, that the District Court erred in (1) denying appellant's motion to dismiss appellees' petition for reinstatement with back pay, (2) granting appellees' petition for specific performance of contracts for personal services, (3) failing to give effect to an amendment to appellees' contracts which sanctioned their dismissal, (4) failing to hold that the discharge of appellees was justified by their prior breach of their contracts with the Debtor, and (5) substituting its judgment for that of the appellant

in the ordinary business operations of the Debtor. These points are obviously directed at the reinstatement of appellees.

This issue of reinstatement is far from moot. An issue does not become moot while there exists a real controversy involving the rights of the parties. As stated in *Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.* (C.C.A. 8, 1937) 91 Fed.(2d) 141, at page 144:

“* * * But if the alleged moot question involves the merits, or the controversy has not ceased to exist, although its status may have been changed by appellee, or where only a part of the controversy has ceased to exist and other questions remain for decision, the appeal will not be dismissed.”

See also *Jackson v. Denver Producing & Refining Co.* (C.C.A. 10, 1938) 96 Fed.(2d) 457, 461.

A relatively recent decision of the Court of Appeals for the First Circuit squarely answers and disposes of the contention of appellees. This decision, *Boston & M. R. R. v. Bentubo* (C.C.A. 1, 1947) 160 Fed.(2d) 326, involved the right of a veteran to reemployment. It was held that reemployment pending appeal in order to stop the accumulation of damages does not render the question of right to reinstatement moot.

See also *Walling v. Hemerich & Payne, Inc.* (1944) 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29, holding that the voluntary discontinuance by an employer of “split-day” contracts alleged to violate the Fair Labor Standards Act did not render an action to enjoin use of such contracts moot where “a controversy between the parties over the legality of the split-day plan still remains.” (323 U.S. at p. 43.)

Appellant has been compelled to reinstate appellees in the jobs held by them on December 27, 1951, at the Cloverdale plant of the Debtor, or to restore them to substantially equivalent employment at said plant at equivalent rates of pay (Tr., p. 54). The District Court has held that appellees have a contract right to employment, and an inviolable privilege to remain in such employment. Appellant is directed, on the one hand, to conduct and operate the business of the Debtor to the best of his ability (Tr., p. 5); on the other hand, he is compelled to retain certain individuals as employees whatever his business judgment may be as to their ability to perform their jobs. Moreover, he is compelled to retain them in the same or substantially equivalent jobs as those held on December 27, 1951, irrespective of his business judgment that such jobs could better be performed by other employees. In addition, appellant claims that appellees have no such contract as they allege in their petition; that such was abrogated by the amendment of the By-Laws of Debtor upon the 10th of September, 1950. Such claim of appellant is a continuing one and has application to many of his employees not parties to this proceeding, and appellant now seeks the ruling of this Court as to the validity of not only appellees alleged contracts, but to the alleged contracts of such other employees not parties hereto. Therefore, this appeal and the question of its being moot is directly covered by the decisions hereinabove cited, viz: *Cramer v. Phoenix, etc., Boston, etc., v. Bentubo* and *Jackson v. Denver, etc.*, supra. Furthermore, the question of the damages allowed appellees by the lower Court is present in all force and depends upon the answers given by this Court to the questions presented herein by appellants. We submit

that the issue of the right of appellees to reinstatement is most real.

II.

The District Court Erred in Ordering Reinstatement of Appellees

Appellees endeavor to justify their reinstatement on two grounds, viz:

- (1) The District Court had power to correct improper and unauthorized action of appellant; and
- (2) Appellees were entitled to employment under their contracts with the Debtor.

A. APPELLANT'S ACTION WAS WITHIN HIS AUTHORITY AS TRUSTEE FOR THE DEBTOR.

Appellees endeavor to make much weight of their contention that their discharge was not authorized by the Court. *The simple answer to this contention is the fact that appellant was acting within the authority expressly conferred upon him by the District Court of the United States for the Northern District of California, Northern Division.*

Appellant was appointed Trustee of the Debtor by Order of the Honorable Dal M. Lemmon, before whom the proceedings for reorganization of the Debtor pursuant to Chapter X of the Bankruptcy Act are now pending (Tr., pp. 3-8). By said Order, appellant was authorized and directed as follows:

“It is Further Hereby Ordered that the trustee appointed herein be and he is hereby authorized and directed, pending further order herein, to conduct and operate the business of the debtor and to manage, maintain and keep in proper condition and repair the assets, properties and business of the debtor, wherever

situated; *to employ and discharge, and to fix, subject to the approval of the court, the rate of compensation of all officers, managers, superintendents, agents and employees; * * *.*" (Tr., p. 5) (Emphasis added.)

This Order *expressly* authorized appellant to employ and to *discharge* any officers, managers, superintendents, agents and employees of Debtor. More direct language conferring discretionary authority upon appellant is difficult to imagine.

The vesting of such authority in appellant was consonant with and pursuant to Chapter X of the Bankruptcy Act. Section 189 of said Chapter X (11 U.S.C.A., Sec. 589) provides, in part, as follows:

"A trustee of debtor in possession, upon authorization by the judge, shall operate the business and manage the property of the debtor during such period, limited or indefinite, as the judge may from time to time fix * * *."

An important function of a Trustee in reorganization proceedings is thus to operate the business of the Debtor, i.e. to supply the business experience, skills and attention which the court and lawyers necessarily cannot provide. The performance of this function quite naturally must involve a wide discretion, and this is recognized in both Judge Lemmon's Order and the statute quoted above. The operation of a business such as that of the Debtor involves the constant exercise of judgment and discretion. The Trustee having exercised his business judgment in a business matter placed within his province by judicial order pursuant to Chapter X, should the court then substitute its business judgment for that of the Trustee?

B. THE DISTRICT COURT ERRED IN SUBSTITUTING ITS BUSINESS JUDGMENT FOR THAT OF APPELLANT.

The relative positions occupied by the Court and Trustee in bankruptcy proceedings was very ably set forth in *In re Baber* (D.C. Tenn., 1902) 119 Fed. 520, at page 526, as follows:

“* * * Undoubtedly, by the very terms of the bankruptcy statute, the trustee acts at all times technically under the direction of the court, and no doubt he has on proper occasions and under proper circumstances, the right to apply to the court for its instructions in the premises. Section 47(2). But this does not mean that he can shovel the administration of his trusteeship into the court, unload his responsibility upon the referee, or judge of the court, and evade or shirk his plain duties by asking the advice and directions of the court. Properly he should be a man of affairs, ready to act upon his own responsibility and intelligence, as business men do in their own affairs; * * *”

While the *Baber* decision involved a trustee appointed in ordinary bankruptcy proceedings, the quoted language is even more pertinent in reorganization proceedings, which contemplate continued normal business operation of the Debtor rather than liquidation. *In re Realty Associates Securities Corporation* (D.C. N.Y., 1944) 54 F. Supp. 787, 788.

To the same effect see *2 Remington on Bankruptcy*, Section 1120, page 677, where it is stated:

“* * * Where a matter rests in the discretion of the trustee, the court, ordinarily, will not instruct him how to exercise his discretion * * *.”

See also *In re Moir Hotel Co.* (C.A. 7, 1950) 186 Fed.(2d) 377, 381-2.

Appellees and the District Court have overlooked this fundamental position of a Trustee in reorganization proceedings, as well as the express authority to employ and discharge employees vested in appellant by Judge Lemon's Order. Their error in this respect is well illustrated by the authorities cited in the Brief of Appellees (pp. 11-14) to sustain their reinstatement. None of these authorities involved an exercise by a trustee of authority clearly within his province. Thus, *In re Howard* (D.C. Cal., 1904) 130 Fed. 1004, *aff'd*. 135 Fed. 721, involved the power of the court to direct a trustee in ordinary bankruptcy to pay a final judgment. Similarly, *Pearson v. Higgins* (C.C.A. 9, 1929) 34 Fed.(2d) 27 concerned the power of the court to determine legal title to, and right to possession of, certain property. In *Imperial Assur. Co. v. Livingston* (C.C.A. 8, 1931) 49 Fed.(2d) 745, the court was concerned solely with the question whether a trustee or receiver in ordinary bankruptcy has an insurable interest in the bankrupt's estate. *Western Pac. R. Corporation v. Baldwin* (C.C.A. 8, 1937) 89 F.(2d) 269 involved an attempt to tie up one of the principal assets of the debtor in a voting trust. And *Freeman Coal Mining Corporation v. Burton* (Ill., 1944) 58 N.E.(2d) 589 concerned action by a trustee which, in effect, constituted a gift of property of the estate.

None of these decisions involved a matter, such as here presented, lying within the business discretion of the trustee, or within the authority expressly conferred upon the trustee. In none of these decisions, nor in any other case, has a court undertaken to *reverse* a business decision made by the trustee. The confusion which would result if every business policy of the Debtor were to be determined in court

is obvious. We respectfully submit that the Court erred in substituting its business judgment for that of appellant as Trustee in the present case.

C. APPELLEES HAVE NO CONTRACTUAL RIGHT TO CONTINUED EMPLOYMENT.

Appellees took the position before the District Court that they have a contract of employment with the Debtor, expressed in its original By-laws, which cannot be amended without their unanimous consent. More specifically, appellees contended, and the District Court held, that the original By-laws of the Debtor conferred upon them a vested right to continued employment which could not constitutionally be impaired by an amendment to such By-laws.

The facts bearing upon this issue were summarized in appellant's Opening Brief at pages 11 to 14, inclusive. Briefly stated, Section 2 of Article V of the original By-laws of the Debtor permitted discharge of a stockholder-employee only by vote of the board of directors, subject to review at a meeting of the stockholders (Tr., p. 197). Article VIII of said original By-laws expressly and specifically provided that said Section 2 could be amended by majority vote of the Class A Stockholders (Tr., p. 200). Said Section 2 was so amended, long before the discharge of appellees, to provide that the general manager of the Debtor "may employ, suspend and *discharge* such agents and employees of the corporation as he may from time to time deem necessary, and prescribe their terms of employment and compensation" (Tr., pp. 47-48).

Appellees thus rely upon a contract of employment which specifically and unequivocally provided that the provisions of such contract relating to discharge could be amended at

any time by majority vote of the Debtor's stockholders. Any rights which they derived from such contract, vested or otherwise, were thus subject to any such amendment. The amendment here at issue was adopted in the prescribed manner, and its language giving the general manager unqualified authority to discharge employees is too clear to be subject to question. How, then, can it be contended that appellees have been deprived of any vested contract rights when their original contract and upon which they charge and rely expressly sanctioned the modification which was adopted? (See *Baldwin v. Miller & Lux* and other authorities reviewed at pages 14 to 20, inclusive, of appellant's Opening Brief.)

Appellees do not and cannot offer a real answer to such situation. An examination of the authorities relied upon by appellees demonstrates the weakness of their position (Appellees' Brief, pp. 16-18). These decisions are clearly not in point here. First, they all involve the *interpretation* of a *general* power of amendment. None of the cases relied upon by appellees involved a *specific* power to amend a *specific* provision, which, as the California Supreme Court held in *Baldwin v. Miller & Lux* (1907) 152 Cal. 454, at page 458, cannot be ignored. See also, *Note*, 8 A.L.R. (2d) 893, 907-909.

Moreover, the first two decisions relied upon by appellees, viz., *Bonnstein v. District Grand Lodge No. 4* (1906) 2 C.A. 624 and *Schack v. Supreme Lodge* (1908) 9 C.A. 584, involved attempts to modify insurance contracts with members of mutual benefit societies under a general power of amendment. The unique considerations present in such a case are readily apparent. *State v. San Francisco Savings & Loan Soc.* (1924) 66 C.A. 53 also presented a situation

readily distinguishable from that now before this Court. The amendment there in question sought to retroactively affect contracts with the depositors of a savings bank, i.e. its *creditors*. As noted in *Wilson v. Cherokee Drift Mining Co.* (1939) 14 Cal.(2d) 56, at page 58, such a case, "dealing with liability to creditors, has no relevancy where, as here, we are concerned with the interrelations of the corporation and its stockholders."

The final decision relied upon by appellees also involved a *general* power of amendment. *Bechtold v. Coleman Realty Co.* (Penn., 1951) 79 A.(2d) 661. Moreover, it is contrary to the settled principles enunciated by the California Supreme Court and the great weight of authority elsewhere. See authorities and discussion at pages 14 to 20 of appellant's Opening Brief. See also *Notes*, 8 A.L.R.(2d) 893, 105 A.L.R. 1452.

The District Court, we respectfully submit, erred in holding that appellees have a vested right to continued employment which may not be constitutionally impaired without their consent; appellees gave such consent when they accepted their stock, with the provision for amendment then in the by-laws. A consent to a change may be given in advance; here there was no revocation of such consent by appellees before or at the time of such amendment.

D. MOREOVER, THE REINSTATEMENT OF APPELLEES CONSTITUTED A DEGREE OF SPECIFIC PERFORMANCE OF AN ALLEGED PERSONAL SERVICE CONTRACT.

Appellees apparently do not contend that their alleged contracts are anything more than personal service contracts. As such they fall squarely within the authorities discussed at pages 21 to 24 of appellant's Opening Brief, which

authorities establish that such contracts may not be specifically enforced.

Appellees' attempt to sustain the decision of the District Court by an argument that injunctive relief is a proper remedy for breach of a collective bargaining agreement overlooks two fundamental facts

- (1) The authorities supporting such relief do not purport to require the employer to employ *specific* individuals, but merely to abide by *his agreement to bargain collectively*; and
- (2) The contracts here presented in no way resemble a collective bargaining agreement.

A "collective bargaining agreement" is "an agreement between an employer and a labor union which regulates the terms and conditions of employment with reference to hours of labor and wages, and deals also with strikes, lockouts, walkouts, arbitrations, shop conditions, safety devices, the enforceability and interpretation of such agreement and of numerous other relations existing between employer and employee." *Railway Mail Ass'n v. Murphy* (1943) 44 N.Y.S. (2d) 601, 605-6. The California Supreme Court used much the same language in describing collective bargaining agreements in *Levy v. Superior Court* (1940) 15 Cal.(2d) 692.

Appellees' alleged contracts contain no resemblance to a collective bargaining agreement. In fact, they lack the primary feature of such an agreement, namely, *collective bargaining*. Moreover, they do not purport to regulate the terms and conditions of employment except to a very limited extent and in a remote sense. Appellees' contention in this respect strains the imagination.

E. APPELLEES COULD NOT BE FORCED TO GIVE UP THEIR SHARES UPON THEIR DISCHARGE.

Appellees express concern that, by reason of their discharge, they could be forced to give up their shares of capital stock of the Debtor. In this connection, the Articles of Incorporation of the Debtor provide that the Debtor shall have the option to purchase shares of any stockholder who ceases to be an employee (Tr., p. 39).

Appellees' concern is without foundation. Appellant has no power to expend the funds of the Debtor to purchase capital stock of the Debtor; appellant's powers relate solely to the conduct of the Debtor's business and the development of a plan of reorganization. All other powers over the Debtor's estate rest with the Court. *Bankruptcy Act*, Sec. 111; 11 U.S.C.A., Sec. 511.

Moreover, appellees have already given options to another to purchase their stock (Tr., pp. 14, 88, 89). And, as shown in appellant's Opening Brief (p. 21), their failure to first offer their shares to the Debtor constituted a breach of their contract which justified their dismissal.

III.

**The District Court Erred in Directing
Payment of Back Pay to Appellees**

With the exception of the issue as to specific performance, all of the foregoing principles are equally applicable to the District Court's award of back pay to appellees. *In fact, the award of back pay can only be predicated upon a decision that appellees have a binding contract entitling them to continued employment.*

Obviously, neither appellant nor the Court has the power to make a gift of the Debtor's property. Only legal obli-

gations of the Debtor may be recognized; *moral* obligations have no standing. *Wainscott v. Occidental Building and Loan Assoc.* (1893) 98 Cal. 253, 255; *Soberanes v. Soberanes* (1893) 97 Cal. 140, 146. The Court and the Trustee represent *all* interested parties, not just an isolated group thereof. *In re Otto-Johnson Mercantile Co.* (C.C.A. 10, 1931) 48 F.(2d) 741, 742; *In re Fergus Falls Woolen Mills Co.* (D.C. Minn., 1941) 41 F. Supp. 355.

Accordingly, the District Court had no power to order the back pay award unless such award was in recognition of a *binding obligation* of the Debtor to appellees. It may not be predicated upon a mere reversal by the Court of a decision made by appellant as Trustee. The only obligation asserted by appellees is based upon their contracts embodied in the By-laws of the Debtor and, as we have shown, the discharge of appellees was pursuant to and not in violation of said By-laws.

IV.

The District Court Erred in Ordering Appellant to File a Supersedeas Bond

We agree with appellees that, in view of the stay granted by this Court, this issue is now moot (Appellees' Brief, p. 27). It should be noted, however, that appellees' argument completely overlooks the words "in any case" added to Section 25(b) of the *Bankruptcy Act* (11 U.S.C.A. Sec. 48(b)) subsequent to the decision upon which they rely namely, *Pacific Coast Casualty Co. v. Harvey*, 250 Fed. 952. The rule of that case was based on the fact that the Trustee therein went outside of his district and commenced a plenary action, contrary to the facts herein, and no information as to the

assets of the Debtor company was available to the Court in which such action was pending. Probably one of the reasons for the amendment of Sec. 25-b of the Act by the addition of the words "in any case" was the decision in the *Harvey* case. We submit that Sec. 25-b is clear and plain and means what it states "in any case".

V.

The District Court Erred in Retaxing Costs Against Appellant

As to cost of a transcript of certain remarks of the Court ordered, not by the Court, but by counsel for appellees, for his own convenience, we respectfully submit that the law continues to deny the taxation thereof as costs. *Department of Highways v. McWilliams Dredging Co.* (D.C. La., 1950) 10 F.R.D. 107.

As to the witness fees and mileage, we respectfully refer this Court to the authorities cited at page 29 of appellant's Opening Brief, holding that witness fees and mileage of a party may not be taxed as costs.

CONCLUSION

The decision of the District Court has placed appellant in the impossible position of attempting to comply with two irreconcilable judicial mandates. On the one hand, appellant has been directed by Judge Lemmon to operate the business of the Debtor to the best of his ability. By the decision herein appealed from he is required to maintain appellees in their present or equivalent jobs, though other employees may be better suited therefor. Moreover, the rights declared by said decision to be vested in appellees must also

be considered to be vested in the other stockholder-employees. We respectfully submit that, under the facts and law reviewed herein, this condition must be corrected by a reversal of the decision of the District Court.

Respectfully submitted,

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